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No. 84-589-CFY
Status: GRANTED

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v.
United States

Docketed:
October 9, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Abzug, Michael D.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 9 1984	G	Petition for writ of certiorari filed.
2	Nov 8 1984		Supplemental brief of petitioner Paul E. Dowling filed.
4	Nov 10 1984		Order extending time to file response to petition until December 10, 1984.
5	Dec 5 1984		Brief of respondent United States in opposition filed.
6	Dec 12 1984		DISTRIBUTED. January 11, 1985
7	Jan 14 1985		The petition for a writ of certiorari is granted limited to Question I presented by the petition. Justice Powell OUT. *****
8	Feb 11 1985		Record filed.
9	Feb 11 1985		Certified copy of original record & C.A. proceedings, 3 volumes, received.
10	Mar 2 1985		Joint appendix filed.
11	Mar 2 1985		Brief of petitioner Paul E. Dowling filed.
12	Mar 15 1985		SET FOR ARGUMENT. Wednesday, April 17, 1985. (1st case).
13	Mar 22 1985		CIRCULATED.
14	Mar 29 1985		LODGING by Recording Industry Association as amicus curiae of unpublished report of the U.S. Copyright Office.
15	Mar 29 1985	G	Motion of Recording Industry Association of America, Inc. for leave to file a brief as amicus curiae filed.
16	Apr 2 1985	X	Brief of respondent United States filed.
17	Apr 15 1985		Motion of Recording Industry Association of America, Inc. for leave to file a brief as amicus curiae GRANTED.
18	Apr 17 1985		ARGUED.

84-589 (1)

No. _____

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**In the Supreme Court of the
United States**
OCTOBER TERM, 1984

PAUL EDMOND DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

- I. WHETHER THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN CONCLUDING THAT THE INTERSTATE TRANSPORTATION OF RECORD ALBUMS CONTAINING COMPOSITIONS RECORDED WITHOUT THE CONSENT OF THE COPYRIGHT OWNER CONSTITUTES THE TRANSPORTATION OF "STOLEN GOODS" WITHIN THE MEANING OF 18 U.S.C. §2314?
- II. WHETHER THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN CONCLUDING THAT THE MANUFACTURE AND DISTRIBUTION OF RECORD ALBUMS CONTAINING COMPOSITIONS RECORDED WITHOUT THE CONSENT OF THE COPYRIGHT PROPRIETOR CONSTITUTE "MAIL FRAUD" WITHIN THE MEANING OF 18 U.S.C. §1341?

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No. _____

**In the Supreme Court of the
United States**
OCTOBER TERM, 1984

PAUL EDMOND DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioner, Paul Dowling, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on August 10, 1984.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears as Appendix "A" attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 10, 1984. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2314 provides, in pertinent part, as follows:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

* * *

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

* * *

The mail fraud statute, 18 U.S.C. § 1341, provides as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other articles, or anything represented to be or intonated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

The criminal infringement of a copyright statute, 18 U.S.C. § 2319, provides, in part, as follows:

(a) Whoever violates Section 506(a) (relating to criminal offenses) of Title 17 shall be punished as provided in Section (b) of this Section and such penalty shall be in addition to any other provisions of Title 17 or any other law.

(b) Any person who commits an offense under subsection (a) of this Section —

(1) Shall be fined not more than \$250,000 or imprisoned for not more than five years, or both, if the offense —

(A) Involves the reproduction or distribution, during any one-hundred-and-eighty day period, of at least 1,000 phonorecords or copies infringing the copyright in one or more sound recordings;

* * *

(C) A second or subsequent offense under either subsection (b)(1) or (b)(2) of this Section, where a prior offense involved sound recording, or a motion picture or other audio visual work;

(2) Shall be fined not more than \$250,000 or imprisoned for not more than two years, or both, if the offense —

(A) Involves the reproduction or distribution, during any one-hundred-and-eighty day period of more than 100 by less than 1,000 phonorecords or copies infringing the copyright in one or more sound recordings; . . .

(3) Shall be fined not more than \$25,000 or imprisoned for not more than one year, or both, in any other case.

(c) As used in this Section —

(1) The terms 'sound recording', 'motion picture', 'audio visual work', 'phonorecord' and 'copies' have, respectively, the meaning set forth in Section No. 1 (related to definitions) of Title 17; and

(2) The terms 'reproduction' and 'distribution' refer to the exclusive rights of a copyright owner under clauses (1) and (3) respectively of Section 106 (relating to exclusive rights in copyrighted works), as limited by Sections 107 through 118, of Title 17.

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

This appeal is from the criminal conviction of Petitioner Paul Edmond Dowling, on charges of conspiracy to transport stolen property in interstate commerce, 18 U.S.C. §371, interstate transportation of stolen property, 18 U.S.C. §2314, copyright infringement, 17 U.S.C. §506(a), and mail fraud, 18 U.S.C. §1341. Petitioner was convicted after a court trial on stipulated facts in the United States District Court for the Central District of California, before the Honorable Lawrence T. Lydick.

B. COURSE OF PROCEEDINGS

On March 22, 1983, Petitioner Paul Edmond Dowling and two co-defendants were charged in a twenty-seven count superseding indictment. Mr. Dowling was charged in Counts One, Two through Nine, Ten through Nineteen, and Twenty-Five through Twenty-Seven, which allege, respectively, violations of 18 U.S.C. §371 (conspiracy to transport stolen property); 18 U.S.C. §2314 (interstate transportation of stolen property); 17 U.S.C. §506(a) (copyright infringement); and 18 U.S.C. §1341 (mail fraud).

The District Court severed Mr. Dowling's trial from the trial of his co-defendants, and Mr. Dowling waived his right to a jury

trial. The Court found Mr. Dowling guilty of all counts against him and sentenced him to a cumulative prison term of eighteen months: nine concurrent one-year terms on the misdemeanor copyright violations and three concurrent six-month terms on the three felony mail fraud counts. The Court additionally placed Mr. Dowling on probation for five years on the condition that he pay a \$5,000 fine and perform 1,500 hours of community service.

On appeal, Mr. Dowling did not contest his conviction on the misdemeanor copyright infringement counts (12 through 26 of the indictment). However, Mr. Dowling contested his felony convictions and maintained, as he did before the District Court, that the sale of the materials in no way constituted interstate transportation of stolen property or mail fraud within the meaning of 18 U.S.C. §§2314 and 1341.

C. SUMMARY OF THE STIPULATED FACTS

Mr. Dowling has been a collector of Elvis Presley recordings for over ten years, having massed a record collection of over 2,000 titles. (R.T. 87). He has obtained these recordings generally by purchase from or trade with other collectors located around the world. (R.T. 89).

Beginning in 1976, Mr. Dowling became involved in the sale of Elvis Presley sound recordings as a business. (R.T. 90). Mr. Dowling did not sell copies of recordings commercially released by RCA or any other major label. Instead, he sold records only containing "out takes", i.e., material that had not been commercially released by RCA or other companies. (R.T. 90). At the stipulated facts trial, Mr. Dowling directly admitted that he manufactured and distributed albums (on certain label names not connected with any of the major record companies) containing the out takes of Elvis Presley performances and he paid no royalties to the holders of the composition copyrights. (R.T. 90-112). Mr. Dowling made seven unauthorized albums: one from a concert tape, one from the sound tracks of two Presley motion pictures, and the others from studio "out takes" and tapes of Presley television appearances.

Mr. Dowling utilized the services of Sund Service, an addressing and mailing service located in Glendale, California, which mailed over 50,000 catalogues and flyers advertising the phonorecords. Mr. Dowling's co-defendant collected the orders and then sent them to Mr. Dowling who mailed the requested albums from Maryland.

REASON FOR GRANTING THE WRIT

I

THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN CONCLUDING THAT PETITIONER DOWLING'S ACTS OF COPYRIGHT INFRINGEMENT COULD ALSO SUPPORT FELONY CONVICTIONS FOR MAIL FRAUD AND INTERSTATE TRANSPORTATION OF STOLEN PROPERTY

A. The District and Appellate Courts' Conclusion that Acts Constituting Copyright Infringement May Also Support a Felony Conviction for Mail Fraud and Interstate Transportation of Stolen Property Violates Traditional Notions of Separation of Powers and is Tantamount to Judicial Legislating.

The law is well settled that the legislature, not the courts, should define criminal activity. *See United States v. Bass*, 404 U.S. 336, 347-48 (1971). The separation of powers concern implicit in this principle was recently addressed in *Sony Corporation v. Universal City Studios*, ____ U.S. ____, 104 S.Ct. 774 (1984). In *Sony*, the United States Supreme Court emphasized that "the protection given to copyright is wholly statutory (citation) [therefore] the remedies for infringement 'are only those prescribed by Congress.'" *Id.* at ____, 104 S.Ct. at 783, quoting *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889) (emphasis added). The constitutional premise

underlying this principle is found in Article 1, Section 8 of the United States Constitution which mandates that Congress shall have the power to promote the arts by securing for authors the exclusive right to their writing. This "limited grant . . . is intended to motivate the creative activity of authors" so that the public will have access to the product of their creative activity. *Sony*, ____ U.S. at ____, 104 S.Ct. at 782.

The Supreme Court further explained that the task of defining the scope of this "limited monopoly" has been assigned to Congress precisely because it involves the balancing of interests — the interest of the authors in control and exploitation of their work, and the competing interest of society in the free flow of information and ideas. *Id.* at ____, 104 S.Ct. at 782. For this reason, "[t]he judiciary's reluctance to expand the protection afforded by the copyright laws without *explicit legislative guidance* is a recurrent theme." *Id.* at ____, 104 S.Ct. 783 (citations omitted). The Supreme Court accordingly rejected the view adopted by the Ninth Circuit in *Sony* that a federal copyright infringement claim could be premised upon the sale of a videotape recorder (VTR) to the general public for private home recording of programs broadcasted without charge to the viewer. The Court reaffirmed the principle that only Congress has the power to remedy copyright infringements and the Supreme Court rejected the Ninth Circuit's suggestion of a judicially created remedy for copyright infringement. This Court stated:

"The direction of Art. 1 is that *Congress* shall have the power to promote the progress of science and the useful arts. When, as here, the constitution is permissive, the sign of how far Congress has chosen to go can only come from Congress."

Id. at ____, 104 S.Ct. at 796, quoting *Deepsough Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972).

Petitioner respectfully contends that the District Court's decision that 18 U.S.C. §§ 2314 and 1341 reach acts of copyright and infringement increased the criminal penalties for such conduct beyond that prescribed by Congress in the

Copyright Act, 17 U.S.C. § 506(a) and (b), and the amendments to the National Stolen Property Act (NSPA), 18 U.S.C. § 2319(a). On appeal, the Ninth Circuit rejected petitioner's argument and affirmed the decision of the District Court relying on its decision in *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1275 (1984). In *Belmont*, the Ninth Circuit rejected the argument that nothing in the language of the NSPA or its legislative history suggested that copyright infringement is conduct which may be properly prosecuted under Section 2314. The *Belmont* Court also rejected the argument that recent criminal amendments to the copyright laws, *e.g.*, 18 U.S.C. § 2319(a), indicated that Congress did not intend to punish copyright infringement under 18 U.S.C. § 2314. The *Belmont* Court reasoned that because the amendments to the copyright law were adopted "in addition to other law", and Section 2314 was "other law", copyright infringement could be prosecuted under Section 2314. *Belmont*, 715 F.2d at 461. Thus, the Ninth Circuit refused to follow the Fifth Circuit's decision in *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982).

In *Smith*, the defendant recorded broadcast features from regular "off the air" television broadcasts and then distributed copies. He was convicted of misdemeanor copy infringement and interstate transportation of stolen goods. On appeal, the Fifth Circuit concluded that copyright infringement is not the equivalent of having "stolen, converted or [taking] by fraud" as that phrase is used in 18 U.S.C. § 2314. The Fifth Circuit also determined that it was "not at liberty to find that the rights associated with copyright are within the usual or common sense meaning of the phrase 'goods, ware [or] merchandise.'" 686 F.2d at 239.

In so holding, the court noted that a determination of whether Congress intended for Section 2314 to apply to copyright infringement implicates the constitutional concerns of separation of powers, since significant potential exists for a court to encroach on Congress' law making and prerogative. The Fifth Circuit recognized that it is Congress' province to determine

what shall be a crime and how it shall be punished. The court also applied the principle of statutory construction that criminal statutes are to be strictly construed.

Mr. Dowling requested the Ninth Circuit to reconsider its reasoning in *Belmont* in light of the Supreme Court's decision in *Sony* and the Fifth Circuit's decision in *Smith*. Mr. Dowling argued that the mere fact that remedies in Section 2319(a) were added to the copyright laws in addition to those existing in other laws was hardly "explicit legislative guidance" that Section 2314 was intended by Congress to be a remedy for copyright infringement. *See, e.g., Sony*, ___ U.S. ___ at ___, 104 S.Ct. at 782.

The Ninth Circuit nevertheless relied on rationale of *Belmont* in upholding Mr. Dowling's conviction under the mail fraud statute. *See Appendix "A"* at 6-7. The Ninth Circuit also found unpersuasive Mr. Dowling's argument that *Belmont's* expansive interpretation of Section 2314 was a form of judicial legislating that did not comport with the clear admonition from the Supreme Court to the judiciary that only Congress could prescribe remedies for copyright infringement. *See Appendix "A"* at 10-11.

The following quote from *Belmont*, however, amply illustrates that the Ninth Circuit created a judicial remedy for copyright infringement by holding that such conduct is within Sections 2314 and 1341:

"We recognize that in *Drebin* the original copyrighted works were in fact stolen, where as here, most of the copying was 'off the air' with no proof of interstate transportation of stolen originals. The distinction between 'off the air' copying and the stealing of original copyrighted works was the basis upon which the *Smith* Court distinguished *Drebin*. (Citation). We do not find the distinction meaningful in terms of the purpose of the statute. The evil which Congress addressed in the National Stolen Property Act was the interstate traffic in stolen property. The rights of

copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property. *When society creates new kinds of property and thieves devise new ways of appropriating that property to their own use, the law against transporting property expands with the growth in the varieties of property.* There is no utility in the sort of sterile formality urged upon us by these defendants. *A large percentage of the world supply of entertainment property is generated within this Circuit. If, indeed, the Fifth Circuit takes a different view of the matter, we are not bound to follow it.*"

715 F.2d at 461-462 (emphasis added.) In spite of the Supreme Court's clear pronouncement in *Sony* that it is not for the Circuit Courts to promulgate their own views as to the proper remedy for copyright infringement, the Ninth Circuit did so in relying on *Belmont* to affirm petitioner's conviction under 18 U.S.C. § 1341 and 2314. The different results reached by the Ninth Circuit and the Fifth Circuit demonstrate that reasonable minds will differ as to the proper remedy for copyright infringement. Compare *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), cert. denied, 104 S.Ct. 738 (1984) with *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982). The different results reached by the Fifth Circuit and the Ninth Circuit with respect to the proper course of action for remedying copyright infringement illustrate that the proper remedy should be left to the elected representatives of Congress. Because the Fifth and Ninth Circuits have chosen different courses of action with respect to the same issue, guidance from the Supreme Court is necessary.

A(1) There is No Clear Indication From Either the Statutory Language or the Legislative History of the National Stolen Property Act (NSPA) and the Mail Fraud Statute That Congress Intended Application of These Statutes to Conduct Constituting Copyright Infringement.

In *United States v. Smith*, 686 F.2d 234, 244-46 (5th Cir. 1982), the Fifth Circuit undertook an exhaustive analysis of the legislative history of the NSPA, 18 U.S.C. § 2314. In summary, the Fifth Circuit observed:

"The NSPA was an extension of the National Motor Vehicle Theft Act (citation) (NMVTA), which was passed in response to the growing number of automobile thefts in the United States. . . . In addition, at no time was it suggested that the 1934 statute should be applicable to anything other than tangible property that was stolen, converted, or taken by fraud as those terms were, and are, commonly used and understood Consequently, the legislative history of the 1934 NSPA fails to provide necessary evidence that Congress was aware of the statute's claimed scope. (citation.) Indeed, copyrights and copyright infringement were never mentioned in the legislative history of the NSPA If Congress really intended to enact a statute broad enough to encompass copyright infringement, 'it did so with a peculiar choice of language and in an unusually backhanded manner. [The NSPA] was not necessary to interdict [the interstate infringement of copyrights], for as Congress surely knew, [copyright infringement] already [was] addressed in comprehensive fashion by [other federal] law.' (Citation.) Consequently, the 'legislative history does not demand a broader reading of the statute' than the statutory language apparently requires. (footnote and citation omitted.)"

686 F.2d at 244-46 (emphasis added). Based on the above analysis, the Fifth Circuit concluded that Section 2314 could not be used to prosecute acts of copyright infringement.

The Fifth Circuit's reasoning in *Smith* is equally applicable to an analysis of the legislative history of the mail fraud statute, e.g. 18 U.S.C. § 1341. The legislative history of Section 1341 demonstrates that Congress never considered copyrights or copyright infringement to be within the scope of the mail fraud statute. Nevertheless, in considering Mr. Dowling's argument that the mail fraud statute does not reach copyright infringement, the Ninth Circuit Court of Appeals, relying on its decision in *Belmont*, gave an expansive interpretation of the mail fraud statute and rejected Mr. Dowling's argument.

A(2) The District Court's Ruling and the Ninth Circuit Decision That Acts of Copyright Infringement May Also Come Within The Purview of Mail Fraud and NSPA Statutes Impermissibly Increased Criminal Penalties for Copyright Infringement Beyond That Prescribed by Congress in the Copyright Act

Mr. Dowling respectfully contends that the Ninth Circuit's decision in *United States v. Belmont*, which interprets Section 2314 to encompass copyright infringements, and the Ninth Circuit's decision with respect to Mr. Dowling's appeal, which interprets Section 1341 to proscribe copyright infringement, impermissibly increase the criminal penalties for such conduct beyond that prescribed by Congress in the Copyright Act, 17 U.S.C. § 506(a) and (b), and the amendment to the NSPA, 18 U.S.C. § 2319(a). The Fifth Circuit in *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982), succinctly addressed this issue with respect to Section 2314 as follows:

"The most striking lesson to be learned from the passage of the 1976 Copyright Act is Congress' obvious refusal to allow copyright infringing activity to be punished by felony provisions. To be sure, such provisions are an integral part of Section 2314 and

precisely the reason the Government chose to prosecute defendant Smith under the NSPA. *Equally striking is the fact that the 1976 Copyright Act makes no distinction between copyright infringing activity that implicates interstate commerce or is purely intrastate in nature.* (Footnote omitted.) Of course, the interstate nature of the wrongful activity is the element that gives life to § 2314; it was the element that prompted Congress to federalize many local crimes.

Nevertheless, the Copyright Act of 1976 was intended to be a comprehensive treatment and revision of the copyright laws . . . Both the Senate and House Reports set out in detail the extent of research and study that took place in order to provide for the general and extensive revision of the law . . . *Significantly, the NSPA's interstate commerce and felony punishment provisions were not mentioned in the reports.*"

686 F.2d at 246-47 (emphasis added.)

The Court in *Smith* next observed that before the passage of the Copyright Act of 1976, Congress was urged by the president of the Motion Picture Association of America to increase the imprisonment term for violations of 17 U.S.C. § 506 (film and tape piracy) and 18 U.S.C. § 2318 (counterfeit labelling) to a maximum of three years imprisonment for a first offense and to seven years imprisonment for a second or subsequent offense. The final version of the Act, however, rejected the specifically requested felony provision and incorporated misdemeanor penalties except for second offenders (maximum for two years imprisonment). The *Smith* Court observed:

"It was in this specific and particular context of copyrights that Congress chose *not* to distinguish between copyright infringement implicating interstate or intrastate commerce and chose *not* to invoke

felony provisions."

686 F.2d at 248 (emphasis added).

Thus, all the years of Congressional debate concerning Section 506 of the Copyright Act (misdemeanor penalties for criminal infringement) were for naught if all the while the Congress believed that copyright infringement was also subject to the ten year penalty of Section 2314 and/or, where the mails are utilized, to the five year imprisonment penalty of the mail fraud statute. *E.g.* 18 U.S.C. § 1341.

This analysis is supported by Congress' most recent attack on the pirating of copyrighted works. On May 24, 1982, the President signed into law the Piracy and Counterfeiting Amendment Acts of 1982, PUB. L. No. 97-180, 96 Stat. 91 (1982). The stated purpose of the Act is to strengthen the law against record, tape, and film piracy and counterfeiting by "increas[ing] the penalties for trafficking and counterfeit labels for copyrighted records, tapes and audio visual works and for copyright infringements involving such products." S. Rep. No. 97-274, 4 U.S. Code Cong. & Ad. News (1982) at 127.

The Piracy Act provides a graduated punishment scheme for various copyright infringing activities. This was accomplished by adding yet another new section to the stolen property chapter containing the NSPA, 18 U.S.C. § 2314, and by modifying 18 U.S.C. § 2318 which was originally added to the "stolen property" chapter by the Copyright Act of 1926. The new Section 2319, which sets forth the penalties for violations of 17 U.S.C. § 506 (criminal copyright infringement), provides a penalty scheme under which defendant's acts, *e.g.* copyright infringement not involving sound recording, still carry only the misdemeanor penalties set forth in § 2319(b)(3)¹

¹The pertinent portions of the penalty scheme are as follows: (1) up to five years incarceration and/or a \$250,000 fine for producing or distributing, within a 180-day period, 1,000 or more phonorecords infringing the copyright in sound recordings or 65 copies infringing the copyright in motion pictures; (2) up to two years imprisonment and/or a \$250,000 fine for producing or distributing, within a 180-day

If, as the Ninth Circuit concluded, *see, e.g.*, Appendix "A" at 9-10, Section 2314 of the NSPA or the mail fraud statute proscribes copyright infringement, the Piracy and Counterfeiting Amendments Act of 1982 would have been unnecessary. As stated by the Fifth Circuit in *United States v. Smith*:

"The necessity for these increased punishment provisions was Congress' apparent belief that no felony punishment provisions applied to copyright infringing activities, including the interstate trafficking of pirated works . . . This recent Congressional activity in the area of copyright infringement demonstrates Congress felt a significant need to provide more stringent punishment for various forms of infringement. The specific 1976 Copyright Act, although a comprehensive revision of copyright law, failed to provide the necessary punitive measures. *Of course, the Piracy and Counterfeiting Amendment Act of 1982 would have been unnecessary if the NSPA § 2314 which provides for a \$10,000 fine and/or 10 years imprisonment were available.*

The legislative history of the NSPA § 2314 -- together with the lessons to be learned from passage of the 1976 Copyright Act and the recent Piracy Act -- *provide no basis for this Court to find the activity of defendant Smith to be in conflict with the provisions of § 2314. Indeed, a contrary result is mandated. Of course, this is consistent with a logical and common sense reading of the NSPA's statutory language. It would be a major encroachment upon Congress' lawmaking prerogative to say the activity falls within § 2314.* (Footnote omitted).

686 F.2d 234, 248-49 (emphasis supplied).

period, of more than 100, but less than 1,000 phonorecords infringing the copyright in sound recordings, or more than 7, but less than 65 copies infringing the copyright in motion pictures; and (3) up to one year imprisonment and/or a \$25,000 fine in any other case. *See, e.g.*, 18 U.S.C. § 2319(b)(1)-(3).

**B. Basic Principles of Statutory Construction
Compel the Conclusion That Copyright In-
fringement is Not Encompassed by 18 U.S.C.
§ §2314 and 1341**

The foregoing analysis demonstrates Congress' clear intent and belief that criminal copyright infringement and counterfeiting are covered specifically by the Copyright and Piracy Acts, 17 U.S.C. §506, 18 U.S.C. §2318 and §2319, and *not* by such general statutes as 18 U.S.C. §2314 and 1341. In addition, several well-settled principles of statutory interpretation lead to the same conclusion. The first principle is that where a general statute might be construed to relate to the same subject as a more specific statute, the specific statute should apply to the exclusion of the general. *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973); *Kniess v. United States*, 413 F.2d 752 (9th Cir. 1969). In short, these cases stand for the proposition that where a defendant's conduct falls within the literal language of either of two statutes, one specific and one general, the government must prosecute such conduct under the specific statute.

A second principle of statutory construction applicable here is that where ambiguity exists regarding Congress' intent as to which statute applies, the principle of lenity mandates that any such ambiguity must be resolved in favor of the less severe statute. *Williams v. United States*, ___ U.S. ___, 102 S.Ct. 3088 (1982). *Simpson v. United States*, 435 U.S. 6, 14 (1978).

As in *Williams*, Mr. Dowling's conduct has been addressed in comprehensive fashion by laws *other* than those sought to be utilized by the government. Also as in *Williams*, the language of neither 18 U.S.C. §2314 nor 18 U.S.C. §1341 explicitly reaches the conduct in question. Consequently, "[i]t 'slights the wording of the statute,' (citation)" *Williams*, ___ U.S. at ___, 102 S.Ct. at 3092, to contend that the infringement of an intangible copyright involves "goods, wares, or merchandise" within the meaning of Section 2314 or that the mere act of infringing amounts to "stealing, converting, or taking by fraud"

within the meaning of the statute. Likewise, it severely slights the wording of the mail fraud statute, 18 U.S.C. §1342, to hold that copyright infringement in any manner involves the making of false statements, representations, or omissions intended to deceive — the elements inherent in the "scheme or artifice to defraud" requirement of the statute.

In short, a common sense reading of either statute does not lead to the conclusion that copyright infringement is prohibited. As the Supreme Court has emphasized in another context, " 'when choice has to be made between two readings of what conduct Congress had made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' (citations and footnote omitted.)" *Williams*, 102 S.Ct. at 3095.

Given the extreme ambiguity of Sections 2314 and 1341 insofar as they apply to copyright infringement, and given the clear applicability of the relevant provisions of the Copyright Act, it is major encroachment on Congress' law making prerogative for the Ninth Circuit to apply the harsher alternative of Sections 2314 and 1341 to Mr. Dowling's copyright infringement activity.

II

**THE NINTH CIRCUIT'S DECISION THAT
COPYRIGHT INFRINGEMENT ACTIVITIES
ARE PROHIBITED BY 18 U.S.C. §2314 IS
INCONSISTENT WITH EXISTING NINTH
CIRCUIT PRECEDENT AND THE UNITED
STATES SUPREME COURT'S DECISION IN
SONY CORPORATION V. UNIVERSAL STU-
DIOS, ___ U.S. ___, 104 S.Ct. 774 (1984)**

In *United States v. Carman*, 577 F.2d 556 (9th Cir. 1978), the Ninth Circuit refused to extend Section 2314 to a fraudulent scheme which reduced another's wealth by placing money out of the reach of creditors. The Ninth Circuit held that conduct which places money out of the reach of creditors does

not constitute stealing, conversion or taking by fraud within the meaning of Section 2314. The *Carman* Court reasoned that the specificity of another statute covering the conduct at issue therein strongly suggested that the restrictive interpretation of Section 2314 “‘should *not* be expanded at the government’s will beyond the connotation — depriving an owner of his rights and property — conventionally called to mind.’” 577 F.2d at 565 (citation omitted) (emphasis added). The Court refused to make criminal a form of commercial dishonesty because ambiguities in criminal statutes are resolved in a defendant’s favor. *Id.*

Similarly, specific statutes other than Section 2314 cover the conduct constituting criminal copyright infringement at issue here. *See, e.g.*, 17 U.S.C. § 506(a); 18 U.S.C. § § 2318-2319. The specificity of these statutes strongly suggests that the restrictive interpretation of Section 2314 should not be expanded to encompass conduct beyond the connotation given by the *Carman* Court. Thus, the expansive interpretation given to Section 2314 by the Ninth Circuit in *Belmont* is inconsistent with its prior decision in *Carmen*.

This is especially true here because conceptual inconsistencies exist between the reference in Section 2314 to “goods, wares, [and] merchandise that have been stolen, converted or taken by fraud” and the nature of copyright infringement. First, an intangible property right such as a copyright, is not a “good” within the meaning of the Uniform Commercial Code. *See Cal. Comm. Code* § 2105 (West 1964) and § 9106 (West Sup. 1983) (“‘general and tangible’ means any personal property (including things in action) other than *goods*, accounts . . . and money”) (emphasis added). Under the *Belmont* Court’s interpretation of Section 2314 as including all personal property that is ordinarily a subject of commerce, *see, e.g.*, 715 F.2d at 461 n.1, interference with another’s contract right or chosen action could also be the subject of a Section 2314 conviction.

In *Sony*, however, the Supreme Court explained that the nature of the ownership interest of one who holds a copyright is vastly *different* from one who owns tangible property. The

Copyright Act grants the holder of a copyright the exclusive right to use and to authorize the use of the work, including reproduction, in qualified ways. *Sony*, ____ U.S. ____ at ____, 104 S.Ct. at 784 & n.13. Unlike the law governing tangible property, copyright protection has never accorded the copyright owner complete control for all possible uses of the work. *Id.* All reproductions of the work are not within the exclusive domain of the copyright owner; any individual may reproduce a copyrighted work for a fair use and the owner does not possess the exclusive right to fair use. *Id.* Consequently, a violation of copyright is conceptually different from stealing someone’s tangible property.

In fact, in *Sony*, the Supreme Court explained that a violation of the copyright holder’s exclusive right — that is, an infringement of the right — is a *trespass* into the author’s exclusive rights. Because not every taking or use of a copyrighted material is a trespass, the Supreme Court rejected an analogy between stealing jewelry and the use of VCR’s to record programs for later use at home. The Supreme Court reasoned as follows:

“The premise and the analogy are indeed simple, but they add nothing to the argument. *The use to which stolen jewelry is put is quite irrelevant in determining whether depriving its true owner of his present possessory interest in it is venial; because of the nature of the item and the true owner’s interest in physical possession of it, the law finds that taking objectionable even if the thief does not use the item at all.* Theft of a particular item of personal property of course may have commercial significance, for the thief deprives the owner of his right to sell that particular item to any individual. Time shifting does not even remotely entail comparable consequences to the copyright owner . . .”

____ U.S. ____ at ____, 104 S.Ct. at 793 n.33 (emphasis added).

Mr. Dowling respectfully contends that these remarks demonstrate the inappropriateness of analogizing stolen goods and copyright infringement. With respect to the latter, the use to

which the copyright is put determines whether or not a trespass — an infringement — has occurred, while in the former, the mere fact of taking or deprivation constitutes stealing within the meaning of Section 2314. Interference in the nature of trespass is not stealing, conversation or taking by fraud as that term has been construed. *Cf. United States v. Turley*, 352 U.S. 407 (1957) (the term “stolen” in the Dryer Act, 18 U.S.C. § 2313, which prohibits transporting stolen motor vehicles across interstate lines, encompasses felonious takings accomplished by embezzlement, false pretenses and conversion.)

Here, the stipulated facts reveal that there is no evidence that Mr. Dowling knew that the original recordings were stolen. Thus, the fact that Mr. Dowling may have known that his conduct was illegal because it violated another’s copyright hardly proves that he knew that the original recordings were stolen. Consequently, the District Court erred in concluding that Mr. Dowling’s acts of copyright infringement also constitute interstate transportation of stolen property within the meaning of 18 U.S.C. § 2134.

III

PETITIONER’S CONDUCT CONSTITUTING COPYRIGHT INFRINGEMENT IS NOT, AS A MATTER OF LAW, SUFFICIENT TO SUSTAIN A CONVICTION FOR MAIL FRAUD PURSUANT TO 18 U.S.C. § 1341

As noted earlier, Section 1341 should not be construed to encompass conduct constituting copyright infringement, absent clear legislative guidance by Congress. Moreover, relevant case law interpreting the mail fraud statute demonstrates that conduct constituting copyright infringement does not, as a matter of law, come within the purview of Section 1341.

In order to prove the offense of mail fraud, the Government must show that the accused participated in a scheme to defraud and caused a use of the mail for the purpose of executing the scheme. *Pereiar v. United States*, 347 U.S. 1, 8 (1954). Both the Fourth Circuit and the Ninth Circuit have held that § 1341

should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress. *See, e.g., United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979) *cert. denied*, 445 U.S. 961; *United States v. Kelem*, 416 F.2d 346 (9th Cir. 1969), *cert. denied*, 397 U.S. 952. The Ninth Circuit nevertheless refused to apply this principle to Mr. Dowling’s case.

In upholding Mr. Dowling’s mail fraud conviction, the Ninth Circuit relied on precedent establishing that a nondisclosure or concealment may serve as a basis for the fraudulent scheme requirement in Section 1341. *See, e.g., Appendix “A”* at 7-8. In so doing, the court recognized that existing precedent in the Ninth Circuit had applied Section 1341 to fraudulent schemes involving nondisclosure only where a fiduciary relationship exists between the person who fails to disclose and the person to whom disclosure is owed. *See Appendix “A”* at 7-8. In these instances, the fiduciary duty of disclosure is breached through the fraudulent scheme.

In Petitioner’s case, the Ninth Circuit extended application of Section 1341 even though he did not breach any *fiduciary* duty of disclosure. To reach this result, the Court created a new “duty of disclosure”, the breach of which will now sustain a Section 1341 conviction. The court held that Section 1341 prohibits a fraudulent scheme which violates an independent explicit statutory duty to disclose created by the legislature. *See Appendix “A”* at 9. The court then held that 17 U.S.C. § 115 creates an independent duty of disclosure to copyright holders from those who wish to manufacture and distribute copyrighted materials. Because Mr. Dowling mailed catalogues advertising his phonorecords without disclosing his intent to manufacture and distribute them, the court reasoned that Mr. Dowling breached his independent statutory duty to disclose set forth in 17 U.S.C. § 115. *See Appendix “A”* at 8-10. The Court then concluded that Mr. Dowling’s breach of this independent statutory duty through nondisclosure properly formed the basis of a scheme to defraud under the mail fraud statute. *Id.* This result, however, is in conflict with *United States v. Brewer*, 528

F.2d 492 (4th Cir. 1975), relied upon by the Ninth Circuit, and *United States v. Gallant*, 570 F.Supp. 303 (S.D.N.Y. 1983), distinguished by the Ninth Circuit. See, e.g., Appendix "A" at 9-11.

The Ninth Circuit relied on *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975) as authority for its independent statutory duty analysis. See Appendix "A" at 7-8. The Ninth Circuit characterized the *Brewer* Court as holding that the breach of the independent explicit statutory duty of the Jenkins Act² to register and to provide information to the Florida tax authorities was sufficient to form the basis of a scheme to defraud under the mail fraud statute. *Id.* at 496. The Ninth Circuit's reliance on *Brewer* for this proposition, however, is misplaced. *Brewer* relied on the violation of the Jenkins Act to uphold the District Court's finding of *intent*. 528 F.2d at 496. The Court stated:

"Although using the mails for the interstate sale of cigarettes or other lawful merchandise is in itself an innocent act, it becomes fraudulent when the seller couples it with an intent to transact business in a way that enables his customers to escape taxes by dealing with him. Then it becomes, as the legislative history of the Jenkins Act notes, a form of tax evasion. (Footnote omitted.) There is no doubt that *Brewer* intended to sell cigarettes, free of Florida taxes, to Florida residents. . . . Her willful decision not to comply with the Jenkins Act furnishes additional evidence of her intent to ship cigarettes from North Carolina to Florida, knowing that Florida could not readily detect the sales and collect the taxes that were owed by her customers.

* * *

It is enough that she knowingly devised a scheme that would enable Florida residents to obtain cig-

²The Jenkins Act, 15 U.S.C. § 376, requires a person who sells or transfers for profit cigarettes in interstate commerce to register as a cigarette seller.

arettes without declaring them for taxation. . . ."

Id.

The foregoing quote demonstrates that the *Brewer* Court did not premise its decision upholding the mail fraud conviction on a finding of a breach of an independent explicatory statutory duty. Rather, the *Brewer* Court explained that the precise reason why using the mails for the interstate sale of cigarettes or other lawful merchandise becomes criminal for purposes of Section 1341 is because it is coupled with an intent to transact business in a way that enables customers to escape paying taxes by purchasing cigarettes from the seller. 528 F.2d at 496. Thus, the defendant's failure to register as a cigarette seller in violation of law was *not* construed to be a breach of an independent statutory duty that would *alone* support a conviction for mail fraud.

Brewer does not support the conclusion that a mere failure to disclose distribution to copyright holders, coupled with the use of the mails, is sufficient for a Section 1341 conviction. The scheme at issue here, unlike the scheme in *Brewer*, did not enable customers to escape paying royalties; there is no evidence that the copyright infringement scheme here enabled customers to receive copyrighted materials at substantial savings. Rather, Mr. Dowling's action, at most, deprived the copyright holders of potential royalties or licensing fees from Mr. Dowling — conduct that is specifically punishable under another section of Title 18. See, e.g., 18 U.S.C. § 2318(c)(2) (use of mails in offense). Thus, *Brewer* is distinguishable from the case at bar. Consequently, the Ninth Circuit's conclusion that a scheme to defraud may be premised, for purposes of Section 1341, upon the breach of the "independent statutory duty", see Appendix "A" at 8, to report an intent to manufacture and distribute recordings is not supported by *Brewer*. Under the Ninth Circuit's interpretation, the presence of illegal conduct alone may constitute the basis of the "fraud" element of a mail fraud prosecution. Any violation of statute will support the fraud element under the Ninth Circuit's interpretation.

The Ninth Circuit also relied on the reporting requirements of 17 U.S.C. § 115 to distinguish *United States v. Gallant*, 570 F.Supp. 303 (S.D.N.Y. 1983). See Appendix "A" at 8-9. In *Gallant*, the Court held that defendant's failure to disclose his intention to distribute recordings of copyrighted musical performances to copyright owners was *insufficient* to sustain a mail fraud conviction. *Id.* at 310. The Ninth Circuit reasoned that because Gallant did not manufacture the phonorecords, but rather only distributed them, the reporting requirements of § 115 were inapplicable. Thus, under the Ninth Circuit's view, Gallant did not breach the explicit independent statutory duty in Section 115, and therefore he did not employ a scheme to defraud. Appendix "A" at 9.

The Ninth Circuit's distinction is without substance. Section 115 provides that notice shall be given before *manufacture and distribution*.³ Since the statute requires notice before distribution, then under the Ninth Circuit's analysis, Gallant necessarily breached the "explicit independent statutory duty", by failing to disclose his distribution. The decision in *Gallant* simply cannot be reconciled with the result reached by the Ninth Circuit in the instant case.

³17 U.S.C. § 115 provides in pertinent part:

"(b) Notice of intention to obtain compulsory license —

(1) Any person who wishes to obtain a compulsory license under this section shall, *before or within thirty days after making, and before distributing any phonorecords of the work*, serve notice of intention to do so on the copyright owner . . .

(2) Failure to serve or file the notice required by clause (1) forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders *the making and distribution* of phonorecords actionable as acts of infringement under § 501 and fully subject to the remedies provided by §§ 502 through 506 and 509. Significantly, this section is devoid of any reference to the mail fraud statute." (emphasis added).

In sum, the effect of the Ninth Circuit's interpretation of the mail fraud statute is to allow any statutory violation alone to be the basis of the fraud element of a mail fraud conviction; thus, the potential of bringing almost any illegal act within the province of the mail statute is now a reality. Such an expansive view of Section 1341 is inconsistent with principles of statutory construction, the language and legislative history of the act, and existing precedent. Petitioner requests this Court to grant the Petition for Certiorari and resolve the conflict.

CONCLUSION

For the foregoing reasons, Petitioner Dowling respectfully submits that the Petition for Certiorari should be granted.

Respectfully submitted,

ABZUG & KELLY

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PAUL EDMOND DOWLING

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,	)	NO. 83-5153
)	
vs.	)	D.C. #CR-82-
	)	1005(B)-2-R
PAUL EDMOND DOWLING,)	
)	
Defendant-Appellant.)	

Appeal from the United States District Court
for the Central District of California
Lawrence T. Lydick, District Judge, Presiding
Argued and submitted May 11, 1984

Before: CHAMBERS, TANG and BOOCHEVER, Circuit Judges.
TANG, Circuit Judge.

I.

OVERVIEW

This case involves the unauthorized production and distribution of record albums containing copyrighted material performed by Elvis Presley. Appellant Paul Edmond Dowling appeals his felony convictions of mail fraud, interstate transportation of stolen property, and conspiracy to transport stolen property interstate. Dowling makes three arguments on appeal: (1) use of the mails to advertise copyright infringing material is not a use of the mail in furtherance of a scheme to defraud as required by the mail fraud statute; (2) interstate transportation of copyrighted material is not transportation of goods, wares or merchandise within the meaning of the National Stolen Property Act; and (3) certain testimony of a government witness offered to show intent was inadmissible hearsay, and the district court's admission of that evidence was reversible error. We reject Dowling's arguments and affirm his felony convictions.

II. FACTS

Beginning in 1976, Dowling and co-defendant William Samuel Theaker, aka Vic Colonna, began manufacturing and distributing "bootleg" Elvis Presley phono records — phono records made without the consent of the copyright proprietors. Dowling and Theaker made seven unauthorized albums: one from a concert tape, one from the sound tracks of two Presley motion pictures, and the others from studio "out takes"¹ and tapes of Presley television appearances. The copyright proprietors never authorized release of the master recordings or out takes. The current recordings and at least one out take were obtained by assuring the owner that they were for personal use only.

At the direction of both Dowling and Theaker, Send Service, an addressing and mailing service located in Glendale, California, mailed over 50,000 catalogs and flyers advertising defendants' phonorecords. The catalogs were mailed throughout the United States during 1979 and 1980. Theaker collected the orders and then sent them to Dowling who mailed the requested albums from Maryland.

Defendants conducted a massive business. Two Maryland Post Office employees testified that during 1979-80 Dowling mailed hundreds of packages of albums every week. The mailings ranged from one record to packages weighing 20 to 30 pounds each. Dowling was spending at least \$1,000 per week on postage during this period.

To give the albums an air of legitimacy, defendants used fictitious record labels, "Audifon" and "Amiga", and had the labels printed in Germany. Dowling and Theaker also printed across the bottom of the package: "ALL RIGHTS RESERVED. UNAUTHORIZED DUPLICATION IS A VIOLATION OF APPLICABLE LAWS."

¹"Out takes" are portions of tape not used in the original edited broadcast.

On March 22, 1983, Dowling and co-defendants Theaker and Richard Minor were charged in a twenty-seven count second superseding indictment with conspiracy to transport stolen property interstate in violation of 18 U.S.C. § 371² [Count One]; interstate transportation of stolen property in violation of 18 U.S.C. § 2314³ [Counts Two through Nine]; copyright infringement in violation of 17 U.S.C. § 506(a)⁴ [Counts Ten through Twenty-Four]; and mail fraud in violation of 18 U.S.C. § 1341⁵ [Counts Twenty-Five through Twenty-Seven].

²18 U.S.C. § 371 provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

³18 U.S.C. § 2314 provides in pertinent part:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

⁴17 U.S.C. § 506(a) provides:

Criminal Infringement. - Any person who infringes a copyright willfully and for purposes of commercial advantage shall be punished as provided in section 2319 of Title 18.

⁵18 U.S.C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing

The district court severed Dowling's trial from the trial of his co-defendants, and Dowling waived his right to a jury trial. The court found Dowling guilty of all counts against him⁶ and sentenced him to a cumulative prison term of eighteen months: nine concurrent one-year terms on the misdemeanor copyright violations and three concurrent six-month terms on the three felony mail fraud counts. The court additionally placed Dowling on probation for five years on condition that he pay a \$5,000 fine and perform fifteen hundred hours of community service. Dowling appeals from the felony convictions.⁷

III.

DISCUSSION

A. Scope of the Mail Fraud Statute

Dowling does not dispute the district court's factual findings that he mailed catalogs advertising his bootleg phonorecords. Rather, he argues that as a matter of law his mailing of the catalogs is not punishable under the mail fraud statute, 18 U.S.C. § 1341. Since the applicability of the mail fraud statute to Dowling's conduct is a pure question of law, we review de novo the district court's determination that such a conviction was proper. *See United States v. Moreno-Pulido*, 695 F.2d 1141, 1143 (9th Cir. 1983).

such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

⁶Counts Nineteen through Twenty-Four did not involve Dowling.

⁷Dowling does not appeal from his copyright infringement convictions.

RCA Records (RCA) has the exclusive right to manufacture and distribute Elvis Presley sound recordings produced after July 26, 1954 (whether or not the recordings have been released). Under the terms of a 1973 contract, Presley's estate has the right to receive royalties, through RCA, on all Presley recordings made after March 1, 1973. Dowling does not dispute the fact that he had an obligation under 17 U.S.C. § 115⁸ of the Copyright Act to report to RCA his intent to manufacture and distribute Elvis Presley phonorecords. He argues, rather, that the government can only prosecute him under the Copyright Act, 17 U.S.C. § 506(a), for his failure to report and that the government impermissibly prosecuted him under the Mail Fraud Statute.

We find Dowling's argument without merit. In *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1275 (1984), the court was faced with a similar argument in relation to the applicability of the National Stolen Property Act, 18 U.S.C. § 2314, to acts of copyright infringement. The *Belmont* court rejected appellant's argument that Congress intended to limit the prosecution of infringing acts specifically to the criminal infringement provisions of the Copyright Act, 18 U.S.C. § 506(a). Rather, in *Belmont* the court noted that the recent Piracy and Counterfeiting Amendments Act of 1982, Pub.L. No. 97-180, 96 Stat. 91, evidences

⁸17 U.S.C. § 115 provides in pertinent part:

(b) Notice of Intention to Obtain Compulsory License.-

(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner. . . .

(2) Failure to serve or file the notice required by clause (1) forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

Congress' intent to permit prosecutions under other applicable statutes. As stated in Section 2319(a) of the Piracy Amendments:

Whoever violates section 506(a) . . . shall be punished as provided in subsection (b) of this section *and such penalties shall be in addition to any other provisions of title 17 or any other law.*

(emphasis added). The *Belmont* court concluded that while the wrongful copying of sound and video tapes and motion picture materials constituted copyright infringement, the interstate transportation of the stolen copies was also punishable under Section 2314 of the National Stolen Properties Act. *Id.* at 462.

We find the *Belmont* rationale applicable to the case before us. Dowling has advanced no evidence that Congress intended to provide Section 506 of the Copyright Act as the exclusive prosecutorial route with which to punish individuals who infringe copyrights. If the government can prove the requisite elements to support a mail fraud conviction in relation to Dowling's activities, we find nothing in the Copyright Act to prohibit prosecution of those acts under the Mail Fraud statute.

Dowling next argues that the government failed to establish that his acts constituted mail fraud under 18 U.S.C. § 1341. To prove mail fraud, the government must show that the accused participated in a scheme to defraud, and caused a use of the mails for the purpose of executing the scheme. *Pereira v. United States*, 347 U.S. 1, 8 (1954); *United States v. Kaplan*, 554 F.2d 958, 965 (9th Cir.), *cert. denied*, 434 U.S. 956 (1977). Dowling does not dispute the fact that his catalog mailings constituted a "use" under the terms of the statute.

1. **Scheme to Defraud.** It is settled in this Circuit that a scheme to defraud need not be an active misrepresentation. A nondisclosure or concealment may serve as a basis for the fraudulent scheme. *See United States v. Buckley*, 689 F.2d 893, 897-98 (9th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1778 (1983); *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980).

Dowling does not contest the fact that he concealed his activities from the copyright holders with the intent to deprive them of their royalties. Dowling argues, however, that the law in this Circuit is that non-disclosure may serve as a basis for the fraudulent scheme only when there is a fiduciary relationship between the person who fails to disclose and the person to whom disclosure is owed. He points out that the cases in this Circuit that hold that concealment may constitute fraud all involve a fiduciary type relationship. *See Buckley*, 689 F.2d at 898 (involving a public official's fiduciary duty to the citizenry); *Bohonus*, 628 F.2d at 1172 (involving an employee's deceitful concealment of secret profits from his employer); and *Cacy v. United States*, 298 F.2d 227, 229 (9th Cir. 1961) (involving a seller's concealment of material facts to a buyer).

The government argues, on the other hand, that there is no sound basis to limit non-disclosure fraudulent schemes to situations in which there exists a fiduciary duty. The government intimates that the presence of illegal conduct alone may constitute the basis of the "fraud" element of a mail fraud prosecution.

We decline to adopt the "fiduciary duty" limitation advanced by Dowling nor can we accept the sweeping construction proposed by the government. Rather, we conclude that a non-disclosure can only serve as a basis for a fraudulent scheme when there exists an independent duty that has been breached by the person so charged. This independent duty may exist in the form of a fiduciary duty to third parties, *see Buckley*, 689 F.2d at 898; *Bohonus*, 628 F.2d at 1172; and *Cacy*, 298 F.2d at 229, or may derive from an independent explicit statutory duty created by legislative enactment. *See United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975).

In *Brewer*, the defendant made mail order sales of cigarettes from North Carolina to Florida. In doing so, she violated the Jenkins Act, 15 U.S.C. § 376,⁹ by failing to register as a

⁹15 U.S.C. § 376, provides in pertinent part:

(a) Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes

cigarette seller with Florida officials and by failing to furnish copies of certain invoices. *Id.* at 495. The *Brewer* court found that the breach of the independent explicit statutory duty of the Jenkins Act to register and to provide information to the Florida tax authorities was sufficient to form the basis of a scheme to defraud under the Mail Fraud Statute. *Id.* at 496.

The case before us is similar to the *Brewer* fact pattern. Dowling concedes that 17 U.S.C. § 115 of the Copyright Act created an explicit independent statutory duty to report to RCA his intent to manufacture and distribute Elvis Presley recordings. His mailing of the catalogs without disclosing his intent to manufacture and distribute the Presley phonorecords amounted to a breach of the statutory duty created by Section 115. We find that Dowling's breach of this independent statutory duty through his nondisclosure may form the basis of a scheme to defraud under the Mail Fraud Statute.

The result in *United States v. Gallant*, 570 F. Supp. 303 (S.D.N.Y. 1983), does not suggest a different result. In *Gallant*, the court held that defendant's failure to disclose his intention to *distribute* recordings of copyrighted musical per-

are shipped into a State taxing the sale or use of cigarettes, to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such a sale or transfer and shipment, shall —

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

formances to copyright owners was insufficient to prosecute him under the Mail Fraud Statute. *Id.* at 310. However, in *Gallant*, the defendant was a middleman distributor and not a manufacturer. *Id.* at 307. Because *Gallant* did not make the albums, the reporting requirements of 17 U.S.C. § 115 were inapplicable. *Id.* Thus, in *Gallant*, unlike the present case, there did not exist the breach of an explicit independent statutory duty upon which to base a scheme to defraud.

In conclusion, we stress that the narrowness of our holding permits nondisclosures to form the basis of a scheme to defraud only when there exists an independent duty (either fiduciary or derived from an explicit and independent statutory requirement) and such a duty has been breached. To hold otherwise that illegal conduct alone may constitute the basis of the fraud element of a mail fraud conviction would have the potential of bringing almost any illegal act within the province of the mail fraud statute.

2. Use of the Mails in Furtherance of the Scheme to Defraud. Dowling argues that even if his failure to disclose his intention to make and distribute albums was a scheme to defraud the copyright owners of their royalty fees, his mailing catalogs to advertise the albums was not "in furtherance" of the scheme. He contends that the mailings to potential customers could not further a scheme to deprive the copyright owners of their royalties. We find Dowling's argument unpersuasive.

A mailing need not be from the perpetrator to the victim to be in furtherance of the scheme to defraud. *See Pereira*, 347 U.S. at 8 (mailing was from one bank to another, victim was defendant's wife); *Brewer*, 528 F.2d at 497 (mailing was from defendant to Florida cigarette buyers, victim was the State of Florida); *United States v. International Term Papers, Inc.*, 477 F.2d 1277, 1279 (1st Cir. 1973) (mailing was from defendant to students, victims were various universities and colleges).

Dowling's use of the mail to attract customers was an integral feature of the business' success. We find that the mailing of the

catalogs was clearly in furtherance of his scheme to defraud the copyright owners of their royalty fees.

B. Scope of the National Stolen Property Act.

Dowling does not challenge the district court's factual findings that he transported bootleg phonorecords interstate. Rather he argues that he cannot be convicted of interstate transportation of stolen goods under 18 U.S.C. §2314 when what he transported was not a "good, ware or merchandise" within the meaning of the statute. Since this is a question of law, we review de novo the district court's determination that such a conviction was proper. *Moreno-Pulido*, 605 F.2d at 1143.

Dowling's interpretation of 18 U.S.C. §2314 is precluded by this Circuit's decision in *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1275 (1984). In *Belmont*, the court held that the unauthorized sale of videotape cassettes of copyrighted motion pictures involves goods, wares or merchandise within the meaning of the statute. The court specifically rejected the argument that Congress intended only the Copyright Act to cover this conduct. *Id.* at 462. The court observed that:

The rights of copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property. When society creates new kinds of property and thieves devise new ways of appropriating that property to their own use, the law against transporting property expands with the growth in the varieties of property.

Id. at 461-62 (footnote omitted).

Belmont is dispositive with regard to the facts before us. Dowling's unauthorized sale of phonorecords of copyrighted material clearly involved "goods, wares or merchandise" within the meaning of the statute.

Dowling's argument that *Belmont* was effectively overruled by the Supreme Court in *Sony Corp. v. Universal City Studios*, ___ U.S. ___, 104 S.Ct. 774 (1984), is without merit. The

Sony opinion is inapposite to the question before us. *Sony* only dealt with the narrow question of whether noncommercial home videotaping constitutes "fair use". *Id.* at 795. *Sony* was silent on the question whether copyrights are property within the meaning of the National Stolen Property Act.

C. Hearsay

Dowling challenges the admission of the testimony of Joan Deary, an RCA employee who testified for the government. He contends that Deary's testimony was hearsay and not within the co-conspirator exception to the hearsay rule. Rule 801(d)(2)(E), Federal Rules of Evidence.¹⁰

Deary testified that in 1979 co-defendant Theaker telephoned her and stated that he had heard that as RCA's Presley archivist she wanted to obtain copies of video cassettes of NBC show out takes. Theaker told her he could acquire copies for her if she would provide him with 50 "samplers"¹¹ in return. When Deary asked Theaker how he obtained the tapes, Theaker said: "I paid somebody \$20,000 at NBC."

To fall within the co-conspirator exception to the hearsay rule, the proffered statement must be one that assists the conspirators in achieving their objectives. *United States v. Layton*, 720 F.2d 548, 556 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1423 (1984). We find that Theaker's statement was made to advance the objectives of the conspiracy and that the district court properly admitted the testimony under the co-conspirator exception to the hearsay rule. Theaker's statement was intended to induce Deary to give him the samplers and furthered the conspiracy's objectives of obtaining new material.

¹⁰Rule 801(d)(2)(E) provides that:

A statement is not hearsay if the statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

¹¹A "sampler" is a promotional record to be used by a radio station or retail store for promotional purposes.

IV.
CONCLUSION

We find that Dowling's mailing of the catalogs and the resultant breach of his statutory duty to report under 17 U.S.C. § 115 makes his acts punishable under the mail fraud statute 18 U.S.C. § 1341. We also find that Dowling's interstate transportation of bootleg phonorecords is punishable under the National Stolen Property Act, 18 U.S.C. § 2314. There was no evidentiary error in admitting Deary's testimony under Rule 801(d)(2)(E), Federal Rules of Evidence.

Dowling's felony convictions are AFFIRMED.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on October 9, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and 40 copies)

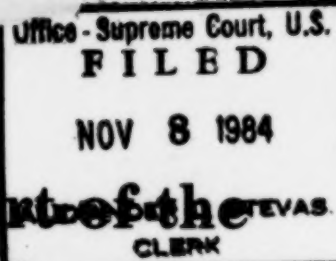
Solicitor General
Department of Justice
Washington, D.C. 20530
(3 copies)

Assistant U.S. Attorney
Charles Lee
U.S. Courthouse, 14th Floor
312 North Spring Street
Los Angeles, California 90012
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 9, 1984, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

84-589 (2)



No. _____

**In the Supreme Court of the
United States**
OCTOBER TERM, 1984

PAUL EDMOND DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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PAUL EDMOND DOWLING

1378

RECEIVED AUG 13 1984

For Publication

A1

FILED

AUG 10 1984

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	
Plaintiff-Appellee,	)	NO. 83-5153
vs.	)	D.C. #CR-82-
PAUL EDMOND DOWLING,	)	1005(B)-2-R
Defendant-Appellant.	)	<u>OPINION</u>

Appeal from the United States District Court
for the Central District of California

Lawrence T. Lydick, District Judge, Presiding

Argued and submitted May 11, 1984

Before: CHAMBERS, TANG and BOOCHEVER, Circuit Judges.
TANG, Circuit Judge.

I.

OVERVIEW

This case involves the unauthorized production and distribution of record albums containing copyrighted material performed by Elvis Presley. Appellant Paul Edmond Dowling appeals his felony convictions of mail fraud, interstate transportation of stolen property, and conspiracy to transport stolen property interstate. Dowling makes three arguments on appeal: (1) use of the mails to advertise copyright infringing material is not a use of the mail in furtherance of a scheme to defraud as required by the mail fraud statute; (2) interstate transportation of copyrighted material is not transportation of goods, wares or merchandise within the meaning of the National Stolen Property Act; and (3) certain testimony of a government witness offered to show intent was inadmissible hearsay, and the district court's admission of that evidence was reversible error. We reject Dowling's arguments and affirm his felony convictions.

II. FACTS

Beginning in 1976, Dowling and co-defendant William Samuel Theaker, aka Vic Colonna, began manufacturing and distributing "bootleg" Elvis Presley phono records — phono records made without the consent of the copyright proprietors. Dowling and Theaker made seven unauthorized albums: one from a concert tape, one from the sound tracks of two Presley motion pictures, and the others from studio "out takes"¹ and tapes of Presley television appearances. The copyright proprietors never authorized release of the master recordings or out takes. The current recordings and at least one out take were obtained by assuring the owner that they were for personal use only.

At the direction of both Dowling and Theaker, Send Service, an addressing and mailing service located in Glendale, California, mailed over 50,000 catalogs and flyers advertising defendants' phonorecords. The catalogs were mailed throughout the United States during 1979 and 1980. Theaker collected the orders and then sent them to Dowling who mailed the requested albums from Maryland.

Defendants conducted a massive business. Two Maryland Post Office employees testified that during 1979-80 Dowling mailed hundreds of packages of albums every week. The mailings ranged from one record to packages weighing 20 to 30 pounds each. Dowling was spending at least \$1,000 per week on postage during this period.

To give the albums an air of legitimacy, defendants used fictitious record labels, "Audifon" and "Amiga", and had the labels printed in Germany. Dowling and Theaker also printed across the bottom of the package: "ALL RIGHTS RESERVED. UNAUTHORIZED DUPLICATION IS A VIOLATION OF APPLICABLE LAWS."

¹"Out takes" are portions of tape not used in the original edited broadcast.

On March 22, 1983, Dowling and co-defendants Theaker and Richard Minor were charged in a twenty-seven count second superseding indictment with conspiracy to transport stolen property interstate in violation of 18 U.S.C. §371² [Count One]; interstate transportation of stolen property in violation of 18 U.S.C. §2314³ [Counts Two through Nine]; copyright infringement in violation of 17 U.S.C. §506(a)⁴ [Counts Ten through Twenty-Four]; and mail fraud in violation of 18 U.S.C. §1341⁵ [Counts Twenty-Five through Twenty-Seven].

²18 U.S.C. §371 provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

³18 U.S.C. §2314 provides in pertinent part:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

⁴17 U.S.C. §506(a) provides:

Criminal Infringement. - Any person who infringes a copyright willfully and for purposes of commercial advantage shall be punished as provided in section 2319 of Title 18.

⁵18 U.S.C. §1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing

The district court severed Dowling's trial from the trial of his co-defendants, and Dowling waived his right to a jury trial. The court found Dowling guilty of all counts against him⁶ and sentenced him to a cumulative prison term of eighteen months: nine concurrent one-year terms on the misdemeanor copyright violations and three concurrent six-month terms on the three felony mail fraud counts. The court additionally placed Dowling on probation for five years on condition that he pay a \$5,000 fine and perform fifteen hundred hours of community service. Dowling appeals from the felony convictions.⁷

III.

DISCUSSION

A. Scope of the Mail Fraud Statute

Dowling does not dispute the district court's factual findings that he mailed catalogs advertising his bootleg phonorecords. Rather, he argues that as a matter of law his mailing of the catalogs is not punishable under the mail fraud statute, 18 U.S.C. § 1341. Since the applicability of the mail fraud statute to Dowling's conduct is a pure question of law, we review de novo the district court's determination that such a conviction was proper. *See United States v. Moreno-Pulido*, 695 F.2d 1141, 1143 (9th Cir. 1983).

such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

⁶Counts Nineteen through Twenty-Four did not involve Dowling.

⁷Dowling does not appeal from his copyright infringement convictions.

RCA Records (RCA) has the exclusive right to manufacture and distribute Elvis Presley sound recordings produced after July 26, 1954 (whether or not the recordings have been released). Under the terms of a 1973 contract, Presley's estate has the right to receive royalties, through RCA, on all Presley recordings made after March 1, 1973. Dowling does not dispute the fact that he had an obligation under 17 U.S.C. § 115⁸ of the Copyright Act to report to RCA his intent to manufacture and distribute Elvis Presley phonorecords. He argues, rather, that the government can only prosecute him under the Copyright Act, 17 U.S.C. § 506(a), for his failure to report and that the government impermissibly prosecuted him under the Mail Fraud Statute.

We find Dowling's argument without merit. In *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1275 (1984), the court was faced with a similar argument in relation to the applicability of the National Stolen Property Act, 18 U.S.C. § 2314, to acts of copyright infringement. The *Belmont* court rejected appellant's argument that Congress intended to limit the prosecution of infringing acts specifically to the criminal infringement provisions of the Copyright Act, 18 U.S.C. § 506(a). Rather, in *Belmont* the court noted that the recent Piracy and Counterfeiting Amendments Act of 1982, Pub.L. No. 97-180, 96 Stat. 91, evidences

⁸17 U.S.C. § 115 provides in pertinent part:

(b) Notice of Intention to Obtain Compulsory License.-

(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner. . . .

(2) Failure to serve or file the notice required by clause (1) forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

Congress' intent to permit prosecutions under other applicable statutes. As stated in Section 2319(a) of the Piracy Amendments:

Whoever violates section 506(a) . . . shall be punished as provided in subsection (b) of this section *and such penalties shall be in addition to any other provisions of title 17 or any other law.*

(emphasis added). The *Belmont* court concluded that while the wrongful copying of sound and video tapes and motion picture materials constituted copyright infringement, the interstate transportation of the stolen copies was also punishable under Section 2314 of the National Stolen Properties Act. *Id.* at 462.

We find the *Belmont* rationale applicable to the case before us. Dowling has advanced no evidence that Congress intended to provide Section 506 of the Copyright Act as the exclusive prosecutorial route with which to punish individuals who infringe copyrights. If the government can prove the requisite elements to support a mail fraud conviction in relation to Dowling's activities, we find nothing in the Copyright Act to prohibit prosecution of those acts under the Mail Fraud statute.

Dowling next argues that the government failed to establish that his acts constituted mail fraud under 18 U.S.C. § 1341. To prove mail fraud, the government must show that the accused participated in a scheme to defraud, and caused a use of the mails for the purpose of executing the scheme. *Pereira v. United States*, 347 U.S. 1, 8 (1954); *United States v. Kaplan*, 554 F.2d 958, 965 (9th Cir.), *cert. denied*, 434 U.S. 956 (1977). Dowling does not dispute the fact that his catalog mailings constituted a "use" under the terms of the statute.

1. Scheme to Defraud. It is settled in this Circuit that a scheme to defraud need not be an active misrepresentation. A nondisclosure or concealment may serve as a basis for the fraudulent scheme. *See United States v. Buckley*, 689 F.2d 893, 897-98 (9th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1778 (1983); *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980).

Dowling does not contest the fact that he concealed his activities from the copyright holders with the intent to deprive them of their royalties. Dowling argues, however, that the law in this Circuit is that non-disclosure may serve as a basis for the fraudulent scheme only when there is a fiduciary relationship between the person who fails to disclose and the person to whom disclosure is owed. He points out that the cases in this Circuit that hold that concealment may constitute fraud all involve a fiduciary type relationship. *See Buckley*, 689 F.2d at 898 (involving a public official's fiduciary duty to the citizenry); *Bohonus*, 628 F.2d at 1172 (involving an employee's deceitful concealment of secret profits from his employer); and *Cacy v. United States*, 298 F.2d 227, 229 (9th Cir. 1961) (involving a seller's concealment of material facts to a buyer).

The government argues, on the other hand, that there is no sound basis to limit non-disclosure fraudulent schemes to situations in which there exists a fiduciary duty. The government intimates that the presence of illegal conduct alone may constitute the basis of the "fraud" element of a mail fraud prosecution.

We decline to adopt the "fiduciary duty" limitation advanced by Dowling nor can we accept the sweeping construction proposed by the government. Rather, we conclude that a non-disclosure can only serve as a basis for a fraudulent scheme when there exists an independent duty that has been breached by the person so charged. This independent duty may exist in the form of a fiduciary duty to third parties, *see Buckley*, 689 F.2d at 898; *Bohonus*, 628 F.2d at 1172; and *Cacy*, 298 F.2d at 229, or may derive from an independent explicit statutory duty created by legislative enactment. *See United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975).

In *Brewer*, the defendant made mail order sales of cigarettes from North Carolina to Florida. In doing so, she violated the Jenkins Act, 15 U.S.C. § 376,⁹ by failing to register as a

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Id. at 461-62 (footnote omitted).

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CONCLUSION

We find that Dowling's mailing of the catalogs and the resultant breach of his statutory duty to report under 17 U.S.C. § 115 makes his acts punishable under the mail fraud statute 18 U.S.C. § 1341. We also find that Dowling's interstate transportation of bootleg phonorecords is punishable under the National Stolen Property Act, 18 U.S.C. § 2314. There was no evidentiary error in admitting Deary's testimony under Rule 801(d)(2)(E), Federal Rules of Evidence.

Dowling's felony convictions are **AFFIRMED**.

A13

FILED

MAY 11 1983

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CY *[Signature]* DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES
OF AMERICA,

Plaintiff,

vs.

PAUL DOWLING, et al.,

Defendants.

NO. CR 82-1005(B)-LTL

GENERAL FINDING
AND
ORDER

This matter is here for decision after trial to the Court without a jury and submission on May 5, 1983.

The Court finds the defendant Paul Edmond Dowling guilty as charged in Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 25, 26 and 27, and each of them.

Let judgment be entered accordingly.

It is ordered that the Federal Probation Service prepare a pre-sentence report with respect to defendant.

Sentencing is set for June 7, 1983 at 1:30 p.m. The defendant is ordered to appear for sentencing on June 7, 1983.

The Clerk of the Court will serve copies of this General Finding and Order by United States mail upon defendant and counsel of record.

DATED: This 11 day of May, 1983.

[Signature]
MAY 13 1983

[Signature]

Lawrence T. Lydick
United States District Judge

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 7, 1984, I served the within *Supplemental Appendix to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and 40 copies)

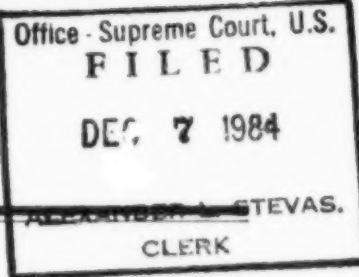
Solicitor General
Department of Justice
Washington, D.C. 20530
(3 copies)

Assistant U.S. Attorney
Charles Lee
U.S. Courthouse, 14th Floor
312 North Spring Street
Los Angeles, California 90012
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 7, 1984, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

No. 84-589



In the Supreme Court of the United States

OCTOBER TERM, 1984

PAUL EDMOND DOWLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE

Solicitor General

STEPHEN S. TROTT

Assistant Attorney General

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17/12/84

QUESTIONS PRESENTED

1. Whether petitioner's distribution of unauthorized reproductions of copyrighted sound recordings could form the basis for charges of interstate transportation of stolen property, in violation of 18 U.S.C. 2314, and mail fraud, in violation of 18 U.S.C. 1341.

2. Whether petitioner's intentional nondisclosure of his manufacture and distribution of copyrighted material, in breach of an explicit statutory duty to notify the copyright holder of those activities, could form the basis of a scheme to defraud under 18 U.S.C. 1341.

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In the Supreme Court of the United States

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No. 84-589

PAUL EDMOND DOWLING, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 739 F.2d 1445.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1984. The petition for a writ of certiorari was filed on October 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Central District of California, petitioner was convicted on one count of conspiracy to transport stolen property in interstate commerce, in

(1)

violation of 18 U.S.C. 371 (Count One); eight counts of interstate transportation of stolen property, in violation of 18 U.S.C. 2314 (Counts Two through Nine); nine counts of copyright infringement, in violation of 17 U.S.C. 506(a) (Counts Ten through 18); and three counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 25 through 27) (Pet. App. A3, A4 n.6).¹ Petitioner was sentenced to a one-year term of imprisonment on one of the copyright infringement counts (Count Ten). In addition, he was sentenced to three concurrent six-month terms of imprisonment on the mail fraud counts, to run consecutively to the sentence on Count Ten. The sentences on all other counts were suspended in favor of five years' probation following the term of imprisonment, on condition that petitioner perform 1,500 hours of community service. Petitioner was also fined \$5,000. *Id.* at A4.

1. The evidence showed that petitioner and his co-defendants successfully conspired to obtain recordings of Elvis Presley vocal performances and, without the consent of the copyright owners, to manufacture and distribute copies of those recordings.² Beginning in about 1976, petitioner and co-defendant Theaker began manufacturing and distributing "bootleg" Elvis Presley phonorecords—*i.e.*, phonorecords made without the consent of the copyright proprietors or RCA

¹ Petitioner's case was severed from that of his co-defendants (Pet. App. A4). Co-defendant Theaker pleaded guilty to six counts of the indictment, and co-defendant Minor was convicted on all charges following a separate trial.

² The case was tried on a stipulated record, including testimony of 29 witnesses and 950 government exhibits. Petitioner testified on his own behalf and cross-examined two of the 29 witnesses.

Records (Pet. App. A2).³ Petitioner and Theaker manufactured these records from soundtracks of Presley motion pictures, tapes of Presley television and concert appearances, and studio outtakes (*ibid.*).⁴ The tapes and at least one studio outtake were obtained by assuring the owner that they were for personal use only (*ibid.*).

During 1979 and 1980, at petitioner's request, Send Service, a labeling and mailing service, mailed catalogs listing the bootleg records to petitioner's customers throughout the United States. Theaker collected the customers' orders through post office boxes in Glendale, California, and Los Angeles. He then sent the orders to petitioner, who mailed the bootleg records to customers from Maryland. Pet. App. A2.

The business petitioner and Theaker operated was massive in scope. For example, at petitioner's request, Send Service mailed over 50,000 catalogs during 1979 (Pet. App. A2). Each week during 1979-1980, petitioner mailed hundreds of packages, ranging from one-record mailings to packages weighing 20 to 30 pounds each. Petitioner's postal bills were at least \$1,000 per week. *Ibid.*

³ During most of his professional career, Elvis Presley was under contract to RCA Records. No Elvis Presley recordings could be released publicly without the authorization of RCA and the copyright proprietors of the songs Presley performed. Deary Stiptest. 22 ("Stiptest." refers to the stipulated testimony submitted to the trial court.). The copyrights for those songs are held by various publishing companies, including Elvis Presley Music, Inc., and Gladys Music, Inc. The soundtracks of Elvis Presley's movies are protected by audiovisual or motion picture copyrights. *Id.* at 111 *et seq.*

⁴ "Outtakes" are portions of tapes not used in the original edited broadcast (Pet. App. A2 n.1).

Petitioner knew that Elvis Presley was under exclusive contract with RCA, that the material he and his co-conspirators were reproducing was copyrighted, and that manufacture and distribution of the bootleg records were illegal (Anderson Stiptest. 3, 5). In order to avoid detection by copyright holders, the FBI, and the public, petitioner and Theaker took steps to conceal the illegality of their conduct (Pet. App. A2; Anderson Stiptest. 3, 5-7, 17; Deary Stiptest. 30, 43).

2. The court of appeals affirmed petitioner's convictions (Pet. App. A1-A12). The court relied on its decision in *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), cert. denied, No. 83-769 (Feb. 21, 1984) and No. 83-1445 (May 29, 1984), in rejecting petitioner's argument that the government was limited to prosecuting him under the Copyright Act, 17 U.S.C. 506(a), and was therefore barred from prosecuting him for mail fraud and for interstate transportation of stolen property in connection with his bootleg record operation (Pet. App. A5-A6, A10-A11). The court concluded that the Piracy and Counterfeiting Amendments Act of 1982, 18 U.S.C. 2319, which explicitly provides that its penalties do not preclude those of the Copyright Act "or any other law," indicated that Congress did not intend the Copyright Act to constitute the exclusive remedy for activity involving copyright infringement (Pet. App. A6).

The court of appeals also held that, for purposes of 18 U.S.C. 1341, a scheme to defraud may be premised not only on nondisclosure in breach of a fiduciary duty, but also on nondisclosure in violation of an independent explicit statutory duty (Pet. App. A6-A7). Since petitioner conceded that the Copyright Act, 17

U.S.C. 115, created a statutory duty to report to RCA his intent to manufacture and distribute Elvis Presley recordings, the court concluded that petitioner's breach of that duty could form the basis for a scheme to defraud under 18 U.S.C. 1341 (Pet. App. A8).⁵

ARGUMENT

1. Petitioner contends (Pet. 6-20) that the court of appeals erred in holding that conduct that involves copyright infringement may constitute violations of 18 U.S.C. 1341 and 18 U.S.C. 2314. He urges that the decision below conflicts with the Fifth Circuit's decision in *United States v. Smith*, 686 F.2d 234 (1982). In fact, there is no irreconcilable conflict between *Smith* and this case. Moreover, this Court previously has denied petitions for a writ of certiorari that have presented similar claims. See *Cooper v. United States*, cert. denied, No. 84-328 (Nov. 26, 1984) (White, J., dissenting); *McCulloch v. United States*, cert. denied, No. 84-5163 (Nov. 26, 1984) (White, J., dissenting); *McKinney v. United States*, cert. denied, No. 84-5219 (Nov. 26, 1984) (White, J., dissenting); *Lockamy v. United States*, cert. denied, No. 84-5319 (Nov. 26, 1984) (White, J., dissenting); *Hampshire v. United States*, cert. denied, No. 83-1445 (May 29, 1984); *Belmont v. United States*, cert. denied, No. 83-769 (Feb. 21, 1984); *Gottesman v. United States*, cert. denied, 460 U.S.

⁵ The court of appeals also rejected petitioner's contentions that mailings of the catalogs were not in furtherance of the mail fraud scheme (Pet. App. A9-A10) and that the testimony of an RCA employee should not have been admitted under the co-conspirator exception to the hearsay rule (*id.* at A10-A11).

1014 (1983). This case does not present any new reason that would call for a different result.⁶

This case presents a different factual situation from that in *Smith*. In *Smith* the defendant had videotaped television programs "off the air" (i.e., from broadcast signals) and had produced and leased multiple copies of the videotaped material. The court held that such conduct did not constitute interstate transportation of stolen property in violation of 18 U.S.C. 2314, since, in the court's view, a copyright could not constitute "goods, wares, [or] merchandise" and copyright infringement could not be regarded as the equivalent of stealing, converting, or taking by fraud within the meaning of the statute (686 F.2d at 241 (footnote omitted)).

Here, in contrast, there were initial unauthorized or fraudulent takings of tangible items (the tapes of motion picture soundtracks, television and concert appearances, and studio outtakes) from their owners and a transfer of information from those tangible items to others (the bootleg phonorecords). See page 3, *supra*. The court in *Smith* acknowledged that such a situation would be distinguishable from the case before it. See 686 F.2d at 243-244 n.17. Thus, whatever the merits of *Smith*,⁷ there is no irreconcil-

⁶ We refer the Court to our briefs in opposition in *Cooper*, *Hampshire*, *Belmont* and *Gottesman* for discussions of why review of this issue is not warranted. We are providing petitioner's counsel with copies of those briefs.

⁷ The court in *Smith* relied in large part on rigid, and in some cases archaic, dictionary definitions of the terms used in Section 2314. See 686 F.2d at 239-242.

Before the decision in this case, both the Eleventh Circuit and the court below had expressly rejected the conclusion reached in *Smith*. See *United States v. Drum*, 733 F.2d 1503,

able conflict between *Smith* and the present case.⁸

Petitioner cites *Smith* for the proposition that Congress intended the copyright laws to be the sole source of penalties for activities involving copyright infringement. In fact, nothing in the legislative his-

1505-1506 (11th Cir. 1984), cert. denied, Nos. 84-328, 84-5163, 84-5219, and 84-5319 (Nov. 26, 1984); *United States v. Gottesman*, 724 F.2d 1517, 1519-1521 (11th Cir. 1984) (citing *United States v. Gottesman*, 685 F.2d 1387 (11th Cir. 1982) (Table), cert. denied, 460 U.S. 1014 (1983)); *United States v. Belmont*, 715 F.2d 459, 461-462 (9th Cir. 1983), cert. denied, No. 83-769 (Feb. 21, 1984) and No. 83-1445 (May 29, 1984). See also *United States v. Gallant*, 570 F. Supp. 303, 310-314 (S.D.N.Y. 1983). And prior to the decision in *Smith* other courts had concluded that transportation of copyright infringing materials could form the basis for charging a violation of Section 2314. See *United States v. Berkowitz*, 619 F.2d 649, 656-658 (7th Cir. 1980); *United States v. Whetzel*, 589 F.2d 707, 710 n.10 (D.C. Cir. 1978); *United States v. Atherton*, 561 F.2d 747, 752 (9th Cir. 1977); *United States v. Drebin*, 557 F.2d 1316, 1332 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978); *United States v. Sam Goody, Inc.*, 506 F. Supp. 380, 385-391 (E.D.N.Y. 1981).

⁸ The transfer of information from one tangible item to another does not remove petitioner's actions from the scope of Section 2314. In *United States v. Bottone*, 365 F.2d 389 (2d Cir.), cert. denied, 385 U.S. 974 (1966), documents had been removed from a company's files, copied, and returned to the files. Judge Friendly, writing for the court, rejected the argument that interstate transportation of the copies would not constitute a violation of Section 2314 on the theory that the copies would not be "goods" that were "stolen, converted or taken by fraud." He stated that "when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial" (365 F.2d at 393-394).

tory of the Copyright Act indicates that Congress intended 17 U.S.C. 506(a) to displace either Section 2314 or the mail fraud statute to the extent the latter statutes otherwise reached activities involving copyright infringement. Moreover, a provision of the 1982 amendments to the Copyright Act, 18 U.S.C. 2319(a), makes clear that penalties under the copyright statutes are not exclusive:

Whoever violates [17 U.S.C. 506(a)] shall be punished as provided in subsection (b) of this section and such penalties shall be in addition to any other provisions of title 17 or any other law.

See *United States v. Gottesman*, 724 F.2d 1517, 1520-1521 (11th Cir. 1984).

In any event, application of Section 2314 and the mail fraud statute to the sort of conduct involved in this case is of considerably diminished significance since passage, subsequent to the offenses involved in this case, of the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 *et seq.* (codified at 17 U.S.C. 506(a) and 18 U.S.C. 2318, 2319). The new statute provides for felony treatment for most serious cases of copyright infringement involving sound recordings and audiovisual materials and trafficking in counterfeit labels, while prior law provided only for misdemeanor treatment for first offenses under the copyright statutes. In view of the increased penalties provided under the new statute, prosecutors are likely to have less occasion to invoke other criminal statutes in connection with copyright infringing activity.⁹

⁹ Petitioner contends also (Pet. 18-20) that the decision below is at odds with *Sony Corp. v. Universal City Studios, Inc.*, No. 81-1687 (Jan. 17, 1984). The court of appeals

2. Petitioner also challenges (Pet. 20-25) the court of appeals' conclusion that his failure to disclose his manufacture and distribution of bootleg recordings to the copyright holders, in violation of 17 U.S.C. 115,¹⁰ could form the basis for finding a violation of 18 U.S.C. 1341. He contends that the court's holding that breach of an explicit statutory duty may form the basis for a scheme to defraud exceeds the intent of Congress and conflicts with *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975), and *United States v. Gallant*, 570 F. Supp. 303 (S.D.N.Y. 1983). While the scheme to defraud here differs somewhat from the typical mail fraud case, prosecutions on this theory have been upheld by the courts of appeals, there is no conflict among the circuits, and the issue does not warrant review by this Court.

The essential elements of the mail fraud offense are "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." *Pereira v. United States*, 347 U.S. 1, 8 (1954). As the Fourth Circuit observed in *Brewer*, "[t]he statute

correctly noted (Pet. App. A10-A11) that *Sony Corp.* deals with the narrow question whether noncommercial home videotaping constitutes "fair use" and is thus inapposite to any question presented by this case.

Petitioner claims also (Pet. 17-18) that the decision below conflicts with *United States v. Carman*, 577 F.2d 556 (9th Cir. 1978). However, petitioner's description of *Carman* makes clear that it did not raise the same issue as this case. In any event, even if there were an intra-circuit conflict, it would not warrant review by this Court. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

¹⁰ 17 U.S.C. 115 requires any person who wishes to obtain a license to make and distribute phonorecords or copyrighted musical works to notify the copyright owner of his intention to distribute.

does not define a scheme to defraud, and it contains no restrictive language excluding any type of fraudulent conduct in which use of the mails plays an essential role. On the contrary, the plain language of the statute condemns any scheme to defraud in which the mails are employed * * *. It leaves 'the matter of what conduct may constitute such a scheme for determination under other laws.' " 528 F.2d at 494-495 (quoting *Parr v. United States*, 363 U.S. 370 (1960)). Accord, e.g., *United States v. DeFiore*, 720 F.2d 757, 761-762 (2d Cir. 1983), cert. denied, No. 83-5847 (Mar. 26, 1984). Petitioner offers no persuasive reason why breach of an explicit statutory duty to disclose may not form the basis for a scheme to defraud within the meaning of Section 1341.¹¹

The court of appeals' holding in this case is clearly consistent with the Fourth Circuit's decision in *Brewer*. The defendant in *Brewer* made mail order sales of cigarettes from North Carolina to Florida. In doing so, she violated the Jenkins Act, 15 U.S.C. 376, by failing to register with Florida officials as a cigarette seller and by failing to furnish copies of certain invoices. 528 F.2d at 495. The *Brewer* court concluded that the defendant's breach of explicit statutory duties under the Jenkins Act was sufficient to form the basis of a scheme to defraud.¹² At least four

¹¹ We note that petitioner also engaged in other deceptive practices, including use of fictitious labels designed to make the bootleg phonorecords appear legitimate.

¹² Petitioner errs in suggesting (Pet. 22-23) that the *Brewer* result is distinguishable because the court in that case relied on the Jenkins Act violation only in connection with the issue of intent. The *Brewer* court agreed with the defendant's contention that use of the mails for the interstate sale of cigarettes is itself innocent, but held that such mailing be-

other courts of appeals also have sustained fraud prosecutions in the face of claims that a mail or wire fraud scheme could not be premised on the breach of a duty to pay state taxes. See *United States v. DeFiore*, 720 F.2d at 761-762; *United States v. Melvin*, 544 F.2d 767, 773-775 (5th Cir.), cert. denied, 430 U.S. 910 (1977); *United States v. Mirabile*, 503 F.2d 1065 (8th Cir. 1974), cert. denied, 420 U.S. 973 (1975); *United States v. Flaxman*, 495 F.2d 344, 348-349 (7th Cir.), cert. denied, 419 U.S. 1031 (1974). The holdings of those courts that breach of an explicit statutory duty may form the basis for a fraud prosecution fully supports the court of appeals' conclusion that petitioner's violation of the duty imposed by 17 U.S.C. 115 to notify copyright holders formed the basis for a scheme to defraud in violation of Section 1341.¹³

comes fraudulent when the seller has an intent to do business in a way that allows his customers to escape taxes. 528 F.2d at 496. Because *Brewer* was aware of the Jenkins Act, and because the success of her scheme depended on her underselling competitors whose price included the Florida tax, the court held that *Brewer's* presumptively innocent mailing of cigarettes in fact formed part of a scheme to defraud. In this case, petitioner's manufacture and distribution of bootleg records similarly formed part of a fraudulent scheme because of his knowing failure to notify copyright owners, as required by statute, thereby avoiding for himself and his customers the payment of royalties.

¹³ *United States v. Gallant*, *supra*, is not to the contrary. The court in that case rejected the government's argument that a record distributor violated the mail fraud statute by distributing bootleg records. The government had conceded, however, that as a distributor (rather than a manufacturer) the defendant in *Gallant* was not bound by an explicit statutory duty under 17 U.S.C. 115, but only by a duty implicit in the structure of the Copyright Act. Moreover, the court in

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

DECEMBER 1984

Gallant expressed reluctance about relying on cases like *Brewer* because the Second Circuit had not done so at that time. 570 F. Supp. at 308. Since *Gallant* was decided, the Second Circuit has endorsed the reasoning of *Brewer* and similar cases. See *United States v. DeFiore*, 720 F.2d at 761.

(H)

No. 84-589

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

**In the Supreme Court of the
United States**

October Term, 1984

PAUL EDMOND DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOINT APPENDIX

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*The full text of the Opinion of the Court of Appeals for the Ninth Circuit is set forth in Petitioner's Supplemental Appendix.

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I.

**DOCKET ENTRIES
UNITED STATES DISTRICT COURT FOR
THE
CENTRAL DISTRICT OF CALIFORNIA**

1.	11/30/82	3	Filed Indictment
2.	1/03/83	20	Arraignment Held (Counts 2-11, 12-20, 27-30; Defendant Appears)
3.	"	21	Defendant Enters Plea of Not Guilty (Counts 1, 2-11, 12-20, 27-30)
4.	1/25/83	29	Filed Superseding Indictment
5.	"	40	Filed Waiver of Statutory & Con- stitutional Rights to Speedy Trial
6.	3/22/83	73	Filed Superseding Indictment
7.	5/02/83	109	Filed Stipulations For Trial
8.	5/05/83	125	Trial Held-Bench (Counts 1, 2-11, 12-20, 27-30; Court Orders Trial Severed From The Trial Of Co- Defendants
9.	5/11/83	143	Court Finds Defendant Guilty As Charged in Counts 1-18, 25-27
		143	Court Judgment of Guilty (ss1- ss18, ss25-ss27)

II.

SECOND SUPERSEDING INDICTMENT

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

October 1982

Grand Jury

UNITED STATES OF
AMERICA,

Plaintiff,

v.

WILLIAM SAMUEL
THEAKER, aka Vic Colonna,
PAUL EDMOND DOWLING,
RICHARD MINOR,

Defendants.

) NO. CR 82-1005(B)-LTL
) SECOND SUPERSEDING
) INDICTMENT
) [18 U.S.C. §371: Con-
) spiracy; 18 U.S.C. §2314:
) Interstate Transportation
) of Stolen Property; 18
) U.S.C. §1341: Mail
) Fraud; 17 U.S.C. § § 106
) (1), (3) and 506(a): Copy-
) right Infringement]

The Grand Jury charges:

COUNT ONE

[18 U.S.C. § 371]

At all times material herein:

1. Defendant WILLIAM SAMUEL THEAKER, also known as Vic Colonna, lived in Glendale, California;
2. Defendant PAUL EDMOND DOWLING lived in Ruxton and Towson, Maryland;
3. Aca "Ace" Anderson, an unindicted co-conspirator, lived in Pasadena, Maryland;

4. Beginning on or about January 1, 1979, or earlier, and continuing until at least February 1, 1982, within the Central District of California and elsewhere, defendants WILLIAM SAMUEL THEAKER, also known as Vic Colonna and PAUL EDMOND DOWLING and Aca "Ace" Anderson did knowingly and willfully conspire to commit offenses against the United States as follows:

- a. To knowingly and willfully transport in interstate commerce phonorecords containing Elvis Presley vocal performances of copy-righted musical compositions and, knowing that the phonorecords were stolen, converted and taken by fraud, in that they were manufactured and were intended to be distributed to the public by sale without the consent of the copyright proprietors, in violation of Title 18, United States Code, Section 2314;
- b. To knowingly and willfully, and for purposes of commercial advantage and private financial gain, manufacture and distribute to the public by sale phonorecords containing Elvis Presley vocal performances of copyrighted musical compositions and, without the consent of the copyright proprietors, in violation of Title 17, United States Code, Sections 106(1), 106(3) and 506(a).

5. The conspiracy was to be carried out in the following manner:

- a. Using material furnished by defendant DOWLING, Anderson, or THEAKER, THEAKER would manufacture phonorecords containing Elvis Presley vocal performances of copy-righted musical compositions without obtaining the consent of the copyright proprietors;

b. Defendant THEAKER would distribute catalogues advertising the phonorecords and would solicit orders from customers throughout the United States and other countries;

c. Defendant THEAKER would ship some of the orders and phonorecords to defendant DOWLING and Anderson in Maryland for distribution to THEAKER, DOWLING and Anderson's customers,

d. Defendant DOWLING and Anderson would fill the orders they received from THEAKER and distribute the phonorecords to the public by sale, without the consent of the copyright proprietors.

6. At all times material herein defendant RICHARD MINOR lived in Miami and Stuart, Florida.

7. Beginning on or about June 1, 1979, or earlier, and continuing until at least November 4, 1981, within the Central District of California and elsewhere, defendant RICHARD MINOR knowingly and willfully joined the conspiracy.

8. After joining the conspiracy, RICHARD MINOR received from THEAKER, DOWLING and Anderson, for distribution to the public by sale, phonorecords containing Elvis Presley vocal performances of copyrighted musical compositions, that had been manufactured without the consent of the copyright proprietors.

9. In addition, after joining the conspiracy, defendant RICHARD MINOR received from THEAKER, DOWLING and Anderson materials for manufacturing phonorecords containing Elvis Presley vocal performances of copyrighted musical compositions, which materials had been obtained and were intended to be used without the consent of the copyright proprietors.

10. To carry out the objects of the conspiracy, defendants THEAKER, DOWLING and MINOR committed various

overt acts in the Central District of California, including but not limited to the following:

a. On or about January 12, 1979, defendants THEAKER and DOWLING shipped approximately 500 cartons of phonorecords from "Paul Dowling", P.O. Box 4213 in Glendale, California to "Gloria Anderson", 817 Patapsco Avenue in Baltimore, Maryland;

b. On or about January 25, 1979, defendant THEAKER had a test pressing made of a phonorecord entitled "Behind Closed Doors";

c. On or about February 21, 1979, defendants THEAKER and DOWLING shipped approximately 115 cartons of phonorecords from "Paul Dowling", P.O. Box 4213 in Glendale, California to "Gloria Anderson", 817 Patapsco Avenue in Baltimore, Maryland;

d. On or about March 2, 1979, defendants THEAKER and DOWLING shipped approximately 211 cartons of phonorecords from "Paul Dowling", P.O. Box 4213 in Glendale, California to "Gloria Anderson", 817 Patapsco Avenue in Baltimore, Maryland;

e. On or about March 14, 1979, defendants THEAKER and DOWLING shipped approximately 250 cartons of phonorecords from "Paul Dowling", P.O. Box 4213 in Glendale, California to "Gloria Anderson", 817 Patapsco Avenue in Baltimore, Maryland;

f. On or about June 4, 1979 defendants THEAKER, DOWLING and MINOR shipped approximately 115 cartons of phonorecords from "Paul Dowling", P.O. Box 4213 Glendale, California to Richard Minor, 9415 S.W. 42nd Street, Miami, Florida.

g. On or about October 23, 1979, defendant THEAKER had test pressings manufactured of Elvis Presley phonorecords entitled "A Dog's Life" and "Plantation Rock".

h. On or about November 8, 1979, defendants THEAKER, DOWLING and MINOR shipped approximately 200 cartons of phonorecords from "Mr. Paperback", 234 North Brand Boulevard in Glendale, California to Richard Minor, 9415 S. W. 42nd Street, Miami, Florida;

i. On or about November 8, 1979, defendants THEAKER and DOWLING shipped approximately 187 cartons of phonorecords from "Mr. Paperback", 234 North Brand Boulevard in Glendale, California to "Gloria Anderson", 817 Patapsco Avenue in Baltimore, Maryland;

j. On or about January 29, 1980 defendant RICHARD MINOR sold the phonorecords "Behind Closed Doors," and "The Rockin' Rebel."

k. On or about August 29, 1980, defendants THEAKER and DOWLING sold the phonorecords "Behind Closed Doors" and "The '68 Comeback".

COUNTS TWO THROUGH SEVEN

[18 U.S.C. §2314]

11. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 10 of the indictment.

12. On or about the dates listed below and to and from the locations hereinafter specified, defendants THEAKER and DOWLING knowingly and willfully caused to be transported in interstate commerce phonorecords of a value of more than \$5,000, containing Elvis Presley performances of copyrighted musical compositions, which

phonorecords, as the defendants then and there well knew, were stolen, converted and taken by fraud, in that they were manufactured without the consent of the copyright proprietors.

<u>COUNT</u>	<u>DATE OF SHIPMENT</u>	<u>FROM</u>	<u>TO</u>
TWO	Jan. 12, 1979	Los Angeles County, California	Baltimore, Maryland
THREE	Feb. 21, 1979	Los Angeles County, California	Baltimore, Maryland
FOUR	Mar. 2, 1979	Los Angeles County, California	Baltimore, Maryland
FIVE	Mar. 14, 1979	Los Angeles County, California	Baltimore, Maryland
SIX	Jun. 4, 1979	Los Angeles County, California	Baltimore, Maryland
SEVEN	Nov. 8, 1979	Los Angeles County, California	Baltimore, Maryland

COUNTS EIGHT THROUGH NINE

[18 U.S.C. §2314]

13. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 10 of the indictment.

14. On or about the dates listed below and to and from the locations hereinafter specified, defendants THEAKER,

DOWLING and MINOR knowingly and willfully caused to be transported in interstate commerce phonorecords of a value of more than \$5,000, containing Elvis Presley performances of copyrighted musical compositions, which phonorecords, as the defendants then and there well knew, were stolen, converted and taken by fraud, in that they were manufactured without the consent of the copyright proprietors:

COUNT	DATE OF SHIPMENT	FROM	TO
EIGHT	Nov. 8, 1979	Los Angeles County, California	Miami, Florida
NINE	Jun. 4, 1979	Los Angeles County, California	Miami, Florida

COUNTS TEN THROUGH EIGHTEEN

[17 U.S.C. §506(a)]

15. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 10 of the indictment.

16. On or about the following dates, within the Central District of California, defendants THEAKER and DOWLING, as set forth below, willfully and for purposes of commercial advantage and private financial gain infringed the copyrights of various copyright proprietors in and to various musical compositions and audiovisual works by distributing to the public by sale phonorecords containing performances of the musical compositions or copies of the soundtracks of the audiovisual works, without the consent of the copyright proprietors:

COUNT	DATE	MUSICAL COMPOSITION OR AUDIOVISUAL WORK	PHONORECORD	COPYRIGHT PROPRIETOR
10	8/29/80	Jailhouse Rock	Rockin' With Elvis New Year's Eve	Gladys Music Inc.
11	8/29/80	Big Boss Man	Elvis' Command Performance	Arc Music
12	8/29/80	Viva Las Vegas	Viva Las Vegas	Metro-Goldwyn-Mayer, Inc.
13	9/12/80	Can't Help Falling In Love	Behind Closed Doors	Gladys Music, Inc.
14	9/12/80	Burning Love	Leavin' It Up To You	Combine Music Corporation
15	9/12/80	Can't Help Falling in Love	Plantation Rock	Gladys Music, Inc.
16	8/29/80	My Way	A Dog's Life	Spanka Music
17	8/29/80	Heartbreak Hotel	The Burbank Sessions, Vol.II	Tree International
18	8/29/80	Loving You	The Rockin' Rebel Vol.III	Elvis Presley Music, Inc.

COUNTS NINETEEN THROUGH TWENTY-FOUR

[17 U.S.C. §506(a)]

17. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 10 of the indictment.

18. On or about January 29, 1980, within the Central District of California, defendant RICHARD MINOR, as set forth below, willfully and for purposes of commercial advantage and private financial gain infringed the copyrights of various copyright proprietors in and to various musical compositions, by distributing to the public by sale phonorecords containing performances of the musical compositions without the consent of the copyright proprietors:

COUNT	MUSICAL COMPOSITION	PHONO- RECORD	COPYRIGHT PROPRIETOR
19	I Slipped, I Stumbled, I Fell	Behind Closed Doors	Gladys Music Inc.
20	Blue Moon of Kentucky	The Rockin' Rebel	Peer International
21	As Long As I Have You	The Rockin' Rebel	Gladys Music Inc.
22	Love Me Tender	The Rockin' Rebel, Vol. II	Elvis Presley Music Inc.
23	Tweedle Dee	The Rockin' Rebel, Vol. II	Chappell Music Company
24	Can't Help Falling In Love	Behind Closed Doors	Gladys Music Inc.

COUNTS TWENTY-FIVE THROUGH TWENTY-SEVEN

[18 U.S.C. §1341]

19. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 10 of the indictment.

20. At all times material herein:

- a. Various companies, including Gladys Music Inc. and Elvis Presley Music Inc., were the proprietors of copyrights for musical compositions that had been performed by Elvis Presley;
- b. These copyright proprietors were entitled to receive royalties from persons who manufactured phonorecords containing Elvis Presley performances of the copyrighted musical compositions;
- c. RCA Records had the exclusive right to manufacture and distribute to the public by sale phonorecords embodying Elvis Presley performances; and
- d. The estate of Elvis Presley was entitled to receive royalties on the sale of phonorecords embodying certain Elvis Presley performances.

21. Beginning on or about January 1, 1979 and continuing until at least February 1, 1982, within the Central District of California and elsewhere, defendants THEAKER and DOWLING and Anderson knowingly and willfully devised and intended to devise a scheme to defraud Gladys Music, Inc. and other copyright proprietors, RCA Records and the estate of Elvis Presley by manufacturing and distributing to the public by sale phonorecords containing Elvis Presley vocal performances without obtaining their consent or making any payments to them.

22. The scheme to defraud was to be carried out in the following manner:

a. Using material furnished by DOWLING, Anderson, or THEAKER, THEAKER would manufacture phonorecords containing Elvis Presley vocal performances of copyrighted musical compositions without obtaining the consent of Gladys Music, Inc. and the other copyright proprietors, RCA Records or the estate of Elvis Presley;

b. Defendant THEAKER would distribute catalogs advertising the phonorecords and would solicit orders from customers throughout the United States and other countries;

c. Defendant THEAKER would ship most of the orders and phonorecords to DOWLING and Anderson in Maryland;

d. Defendant DOWLING and Anderson would fill the orders and distribute the phonorecords to the public by sale, without obtaining the consent of Gladys Music, Inc. and the other copyright proprietors, RCA Records or the estate of Elvis Presley and without making any royalty or other payments to them.

23. On or about the dates listed below, as part of said scheme to defraud, defendants THEAKER and DOWLING knowingly placed and caused to be placed the following items in a Post Office to be sent and delivered by the Postal Service and knowingly caused said items to be delivered by mail according to the directions thereon.

<u>COUNT</u>	<u>DATE</u>	<u>MAIL MATTER</u>	<u>POST OFFICE</u>
25	Jan. 30, 1979	Elvis Rarities Catalog and Flyers	Glendale, California
26	Jun. 14, 1979	Vic Colonna Catalog	Glendale, California

27 Dec. 31, 1980 Vic Colonna Glendale,
Catalog California

A TRUE BILL

Foreperson

STEPHEN S. TROTT
United States Attorney

III.

STIPULATED TESTIMONY (Title Omitted in Printing)**(A) STIPULATION REGARDING TESTIMONY
OF ACA "ACE" ANDERSON**

IT IS STIPULATED AND AGREED THAT Aca "ACE" Anderson was called as a witness by the government and testified as follows:

DOWLING AND THEAKER'S RECORD BUSINESS

1. Anderson lives in Pasadena, Maryland, a suburb of Baltimore. He has been an Elvis Presley collector and fan for several years.

2. In approximately January, 1977, Anderson received in the mail a Vic Colonna catalog advertising several Elvis Presley records. Anderson sent a letter to Vic Colonna at Colonna's post office box inquiring whether there was anyone in the Baltimore area who wanted to trade or buy Elvis Presley records. He received a reply from Colonna informing him that he should contact Paul Dowling at 6 Malvern Court, in Ruxton, Maryland.

3. After receiving Colonna's card, Anderson telephoned Dowling and introduced himself as an Elvis Presley fan. Dowling invited him to a Elvis Presley Fan Club party at his house.

4. During the course of the party, defendant Dowling told Anderson that he and Vic Colonna were partners and that they made and sold various bootleg Elvis Presley records, including "The '68 Comeback," "Elvis Presley Dorsey Shows," "Got A Lot of Livin' To Do," and "The Elvis TV Guide" album.

5. In approximately February, 1977, Dowling asked Anderson if Anderson and his wife, Drema, would be interested in stuffing envelopes with fliers advertising the records, in exchange for 10 percent of all the orders that

were filled with Anderson's help. Anderson agreed and began working for Dowling by stuffing envelopes that were marked with Vic Colonna's return address. In the following months, Anderson began spending more and more time with Dowling, until by 1978 and 1979, he was regularly helping Dowling by wrapping and mailing records, unloading record shipments and accompanying Dowling on various trips. Anderson continued working for Dowling until approximately February, 1982, following his conviction in Memphis, Tennessee, for selling bootleg Elvis Presley records and obstructing service of a search warrant.

6. In early 1977, shortly after Dowling and Anderson met, Dowling told Anderson that the first album he had pressed was the "TV Guide" album, and that he had later pressed the album entitled "The '68 Comeback." Dowling told Anderson that he had met William Samuel Theaker through a man named Paul Lichter and that Theaker and Dowling had become partners after Theaker told Dowling that Theaker could have records pressed more cheaply in Los Angeles than Dowling could on the East coast and that he (Theaker) could also obtain masters and covers. According to Dowling, Theaker told Dowling that with Dowling's knowledge of the Elvis world and Theaker's contacts with the music industry, Dowling and Theaker could become millionaires.

7. Based on Anderson's observations, his conversations with Dowling and listening to several of Dowling's telephone conversations with Theaker, Anderson learned that Dowling generally supplied the underlying musical material for the records (such as tape recordings) and also designed the covers and labels and wrote the liner notes. Theaker, on the other hand, was responsible for pressing the records, distributing catalogs and receiving orders.

8. After Elvis Presley's death in August, 1977, Dowling told Anderson that he had to fly to Los Angeles to help Theaker wrap records, because thousands of orders had come in and Theaker could not keep up with the demand. When Dowling returned, he told Anderson that while in Los Angeles, he had helped Theaker wrap and mail several of their records, including "Rockin' With Elvis, New Year's Eve," "The '68 Comeback," "The Legend Lives On," "Got A Lot of Livin' To Do," "Elvis Presley Dorsey Shows," "Command Performance," "From the Waist Up," and others. Dowling also told Anderson that for a period of between six and eight weeks, Theaker had received between 250 and 300 orders per day for the albums. According to Dowling, although he and Theaker had made enough money through these orders to live comfortably for the rest of their lives, he planned to continue making new albums.

9. According to Dowling, the "Rockin' With Elvis, New Year's Eve" album had initially been made from a tape that Dowling and Theaker had obtained from John Herman. Later pressings, however, were made from a better tape that Dowling had obtained from an individual named Don Lance. Plaintiff's Exhibit 398 is a 7½ ips reel to reel master tape of the Pittsburg New Year's Eve show. The box containing the tape shows that it was sent to Paul Dowling by Don Lance. According to Dowling, if the "Rockin' With Elvis, New Year's Eve" album had been legitimate, it would have been awarded a Gold Record for the number of records sold.

10. Shortly after Anderson met Dowling in January, 1977, Dowling told him that he had learned that RCA's contract with Elvis Presley was exclusive and that only RCA was authorized to produce records of Elvis Presley's singing. However, Dowling told Anderson that in a lawsuit, Buddah Records had established that everyone

had the right to press records containing Elvis Presley's public interviews. Dowling further told Anderson in 1977 that he wished he and Theaker could put the records out legally because Dowling wanted to advertise in national publications such as *TV Guide*, *The Star*, and various magazines devoted to Elvis Presley.

11. In early 1979, Dowling told Anderson that because Theaker was being investigated by the FBI in Los Angeles, Theaker would be shipping most of the records to Dowling for distribution. Dowling asked Anderson if it would be alright to store the records at Anderson's mother's house. Anderson agreed, but after the first shipment arrived, he realized that there were too many records to store in the house. Accordingly, even though the bills of lading for all of the later truck shipments (by Yellow Freight and McClain) stated that the shipments were being made to "Gloria Anderson," Anderson and Dowling took delivery of the records at the trucking terminals and then stored them in garages Anderson had rented.

12. Plaintiff's Exhibits 93 through 96, and 100 are bills of lading and delivery slips for record shipments that Ace Anderson signed for at the Yellow Freight terminal in Baltimore. With the exception of Exhibit 93, (for the January 12, 1979 shipment), all of the bills of lading accurately identify which albums were shipped by listing album names or matrix numbers and the number of copies or cartons which were included in the shipment. For single record titles, such as "Command Performance" there were generally 50 records per carton. For double record albums, such as "The Burbank Session", there were 25.

13. A number of the cartons on the January 12, 1979, shipment (Plaintiff's Exhibit 93), arrived damaged. Anderson submitted a claim for the damaged items and, in the course

of preparing the claim, submitted to the Yellow Freight trucking company, two invoices (Plaintiff's Exhibits 238 and 239), which Paul Dowling had prepared and which listed the albums that were included in the shipment.

14. Plaintiff's Exhibit 102 contains bills of lading for two record shipments, one on November 8, 1979, and one on November 9, 1979, that Theaker made through McLean Trucking Company. The November 8, 1979, bill of lading accurately identified the albums that were being shipped by matrix number and accurately listed how many of each record were being shipped.

15. In 1979, after Theaker began shipping most of the albums to Dowling and Anderson for distribution, he also began sending them packages containing the various catalog orders that customers sent in to him and the customers' letters. Anderson helped fill the orders by wrapping the records and mailing them. Following Dowling's instructions, Anderson mailed some of the records from post offices outside of Maryland, such as one in Alexandria, Virginia.

16. During the same time period, Theaker regularly sent Dowling envelopes of cash, which according to Dowling, represented Dowling's share of the sales. One envelope Anderson saw had approximately \$20,000 in it. In addition, Theaker sent Dowling credit card slips and checks from customers in foreign countries.

17. From approximately April 29 through July 29, 1979, Dowling allowed Anderson to use Anderson's bank account for processing the foreign checks. Anderson deposited the checks and gave the proceeds to Dowling when they cleared. He kept the interest on the checks for himself. Plaintiff's Exhibit 174 is the savings account passbook for the account (at the Merritt Savings and Loan in Baltimore) Anderson used to deposit the foreign checks.

18. Dowling and Theaker used four business names and employed different mailing lists for each. The bulk of the business was done under the name "Vic Colonna." However, Theaker and Dowling also sold records under the names "Golden Archives," "King's Treasurers" and "Elvis Rarities." Dowling told Anderson that they used the different business names so that they could charge different prices for the same albums (depending upon the customer list), and also in order to confuse the FBI.

ANDERSON AND DOWLING'S TRIP TO LOS ANGELES

1. On July 10, 1979, Dowling, Anderson and Anderson's wife came to Los Angeles in order to meet with Theaker and his attorney. Because Dowling and Theaker didn't want anyone to know they were meeting, Dowling and Anderson flew under assumed names. When Dowling, Theaker and Anderson met with Theaker's attorney, Martin Bernstein, they discussed whether they should continue pressing the records and possible defenses to a criminal prosecution. Dowling and Theaker said they would continue pressing the records and agreed that if they were prosecuted they might claim that after Presley's death, they believed anyone could press his records. During this visit to Los Angeles, Anderson accompanied Theaker to the Glendale Post Office, where Theaker picked up mail order correspondence, including orders and cash. During the same visit, Anderson and Dowling visited Theaker at his Glendale house. After seeing master tapes for some of their albums in Theaker's living room, Dowling told Anderson that Theaker was crazy to leave the tapes lying around, because the FBI might find them in a search.

2. Theaker and Dowling have both told Anderson that they were wary of any unusually large record orders, because they could be charged with an interstate transpor-

tation of stolen property if they shipped more than \$5,000 worth of records.

RICHARD MINOR

1. Dowling told Anderson that Richard Minor was a record dealer in Florida who manufactured counterfeit Elvis Presley 45's on the Sun label, which he sold and traded to Theaker and Dowling in exchange for Dowling and Theaker's Elvis Presley albums. (The Sun 45's advertised in the various Vic Colonna catalogs came from Richard Minor.) Frequently, when Dowling's supply of his and Theaker's albums was running low, he would arrange with Richard Minor to repurchase albums that Theaker had previously sent Minor.

2. Plaintiff's Exhibit 705 is an example of a carton that was shipped originally by Theaker to Minor and then by Minor to Dowling. The carton originally contained 50 copies of the Dowling/Theaker album, "Command Performance."

3. Dowling told Anderson of three additional deals involving bootleg Elvis Presley albums that Theaker and Dowling had made with Minor. The first of these deals involved what Dowling and Anderson referred to as the "junk LPs." During 1978, Dowling and Theaker copied approximately 50 bootleg Elvis Presley records that had been released by other individuals. The records had the same covers as the original bootlegs, but were not shrink wrapped and had only two-tone covers — either black and white or a color tint. Dowling and Theaker advertised the albums on a flier and told their major dealers that the records would be available only once and had to be ordered in advance. (Plaintiff's Exhibit 211 is one of the junk LP fliers.) After they sold the records, however, Dowling and Theaker sold the stampers and other materials for manufacturing the records to Richard Minor. According to Dowling, Minor re-pressed the records and began listing them in his own advertisements.

4. Plaintiff's Exhibit 211, the flier advertising the "junk LPs" referred to the albums as "imports" which Vic Colonna had "at last managed to assemble."

5. The second deal with Minor involved the albums "Rockin' Rebel, Volume II," "A Dog's Life," "Leavin' It Up To You," and "Plantation Rock." According to Dowling, in mid-1979, Dowling and Theaker told Minor that they were planning on releasing four new albums. In exchange for receiving approximately half of the initial pressing (5,000 of each of the four records), Minor agreed to invest \$40,000 in the project. Although Dowling and Theaker led Minor to believe that Minor's \$40,000 was half of the total needed, in fact Minor's investment paid Theaker and Dowling's total manufacturing costs.

6. The third major transaction with Minor that Anderson learned of from Dowling involved the records "The '68 Comeback, Volume II," "That's The Way It Is," "Elvis on Tour," and "The Aloha Rehearsal Show." According to Dowling, in early 1980, Horace Waddell was unwilling to press any more records for Theaker, and, accordingly, it was necessary for Theaker and Dowling to find a new presser they could rely on. After losing Waddell, Theaker had had the four albums pressed somewhere else in Los Angeles. The results, however, were unsatisfactory. Accordingly, Theaker and Dowling shipped the mothers and labels to Richard Minor so that the records could be pressed and collated in album covers in Florida. During a conference call, Anderson heard Dowling tell Minor that Theaker was sending Minor these materials. Minor replied that it was "all set."

[The testimony of Ace Anderson on Cross Examination Appears in the Record of Transcript At Pages 75-86]

**(B) STIPULATION REGARDING TESTIMONY
OF JOAN DEARY**

IT IS STIPULATED AND AGREED that Joan Dreary was called as a witness by the government and testified as follows:

Dreary has worked for RCA Records ("RCA") since 1955, the same year Elvis Presley signed an exclusive recording contract with RCA. She worked initially as a secretary to the Presley producer, Steve Sholes. In 1964, Dreary became directly involved in the production of RCA's Presley records and in 1967, she became a producer. During the years 1977-1981, Dreary worked full-time cataloging RCA's Presley tapes and producing Presley records including "Elvis Aron Presley" - 8 Record 25th Anniversary set released in 1980.

Dreary has produced over 40 RCA Elvis Presley albums and is the recognized RCA Presley archivist. She is currently RCA's Director, Artis & Repertoire Administration for the West Coast.

Dreary is familiar with RCA's collection of Elvis Presley master tapes, which include tapes recorded in RCA's studios, Radio Recorders and other outside studios at which Presley was recorded for record albums, television and motion pictures as well as various live concerts and purchased masters. These tapes are maintained in vaults and RCA never authorized release of them. As a producer and archivist, she is familiar with the distinctive sounds of Presley recordings made from audiences, from direct feeds from Elvis' microphone in various concert halls and studios, as well as the distinctive sounds of reference acetates.

Dreary has examined and listened to each of the albums listed in the stipulation regarding the testimony of Aca "Ace" Anderson and has determined that the albums were based on the following source material:

RCA owned master tapes, NBC Television tapes, movie studio master tapes (including tapes originally recorded at Radio Recorders Studios in Hollywood), audience recordings, tapes or film of television shows, and reference acetates or lacquers. Specifically, Dreary determined the attached facts about each of the albums. [The attached descriptions, the package and source of musical content for each album are not represented in this appendix; they appear as pages 27-47 of the stipulated testimony which is included in the excerpt of record filed in the Court of Appeals].

Most of the albums identify performance date and place of recording and in many instances, the "take" number. With the exception of "Rockin Rebel II" (GA 300) all of the music on the albums was recorded after SUN and RCA acquired the exclusive right to manufacture and distribute Elvis Presley sound recordings.

Dreary has listened to the tape marked Plaintiff's Exhibit 173 ("RCA stolen tapes"). The tape contains several songs that appear on "The Legend Lives On" album (Plaintiff's Exhibit 221), as well as additional songs. The original source for the tape was an eight track RCA master-tape recorded in Las Vegas and RCA 16-track tapes. No one in RCA was authorized to release the tapes.

[The testimony of Joan Dreary on cross-examination is set forth in the Record of Transcript at pages 35-75].

**(C) STIPULATION REGARDING TESTIMONY
OF WILBUR E. GARRETT**

IT IS STIPULATED AND AGREED that Wilbur E. Garrett was called as a witness by the government and testified as follows:

1. Wilbur E. Garrett is a Special Agent with the FBI assigned to the Baltimore, Maryland, office. As such, he has been responsible for investigation on the East coast of Paul Dowling and William Samuel Theaker's involvement in bootleg Elvis Presley records.

2. On February 27, 1980, Special Agent Garrett and another FBI special agent, J.R. Nicewarner, met with Paul Dowling at his residence, 817 Trafalger Avenue in Towson, Maryland. During the course of a brief conversation, Dowling asked Special Agent Garrett what the investigation concerned, and Special Agent Garrett replied that he was the subject of a criminal copyright investigation regarding the manufacture and distribution of bootleg Elvis Presley record albums containing copyrighted musical compositions.

3. Special Agent Garrett has examined the Yellow Freight and Mc Clain Trucking bills of lading, (Plaintiff's Exhibits 93-100 and 102-103), the invoices submitted in behalf of Ace Anderson's damaged freight claim (Plaintiff's Exhibits 238 and 239), the stipulations regarding copyrights and songs on albums, testimony of Jim Profetta, testimony of Louis Roderick, testimony of Ace Anderson, the Vic Colonna catalogs (Plaintiff's Exhibits 59, 87 and 89) and the albums themselves.

By determining from the bills of lading and damage-claim invoices how many of each album were shipped and multiplying that number by the albums' catalog list prices, Garrett derived "whole" shipment values which are set forth in chart form below by the indictment counts.

Garrett also determined what fraction of each album (by band) is made up of performances of copyrighted musical compositions. He multiplied these fractions by the number of albums shipped and the catalog prices to determine "fractional" shipment values. The fractional values are also set forth in the chart.¹

Shipment Date & Description	Bill of Lading Exhibit No.	Whole Shipment Value	Fractional Shipment Value	Indictment Count
1/12/79 Dowling to Anderson	93	\$156,960	\$92,204	Two
2/21/79 Dowling to Anderson	94	\$ 40,169	\$18,076	Three
3/2/79 Dowling to Anderson	95	\$ 63,801	\$47,161	Four
3/14/79 Dowling to Anderson	96	\$ 77,940	\$62,352	Five
6/4/79 Dowling to Anderson	98	\$ 47,682	\$31,246	Six
11/8/79 Mr. Paperback to Anderson	102	\$ 93,372	\$70,976	Seven

¹ The calculations do not include the following songs: "An American Trilogy", "Fever", "Get Back", "Good Rockin' Tonight", "Guitar Man", "Hawaiian Wedding Song", "Hey Jude", "I'm So Lonesome I Could Cry", "It's Impossible", "It's Over", "Spanish Eyes", "Suspicious Minds", "The First Time Ever I Saw Your Face" and "Yesterday".

A26

11/8/79 99 \$ 99,800 \$75,848 Eight
Mr. Paperback
to Minor

6/4/79 97 \$ 44,900 \$29,519 Nine
Dowling to
Minor

The calculations are illustrated in exhibits which are attached.

A27

YELLOW FREIGHT
PROBILL #111-477501
(COUNT TWO)

Matrix # and Title	Fraction Copyrighted	Number of Boxes	Number of Records	Divide by 2 if Double LP Set	Price	Fractional Value	Whole Value
Pittsburg New Year's Eve (HNY-76-77)	12/37	X	35	X	50	÷ 2	X 12.98 = \$ 3,634 \$11,357
Elvis Hawaiian Benefit (GA-200)	9/15	x	52	X	50	÷ 2	X 10.98 = 8,564 14,274
Dorsey Shows (GA-100)	8/12	X	64	X	50	÷ 1	X 8.98 = 19,253 28,736
Burbank Session (AFNS 62768)	11/38	X	80	X	50	÷ 2	X 12.98 = 7,528 25,960
Burbank Session II (AFNS 62968)	24/35	X	125	X	50	÷ 2	X 12.98 = 27,988 40,562

(continued on next page)

(continued from previous page)

Matrix # and Title	Fraction Copyrighted	Number of Boxes	Number of Records	Divide by 2 if Double LP Set	Price	Fractional Value	Whole Value
Got a Lotta Living to Do (PR101)	21/26	X	51	X	8.98 =	18,548	22,899
From the Waist Up (GA-150)	8/15	X	11	X	8.98 =	2,617	4,939
Rocking Rebel II (GA-300)	9/10	X	12	X	9.98 =	5,389	5,988
68' Comeback	12/16	X	5	X	8.98 =	1,683	2,245
					Fractional Value	= \$ 95,204	
					Whole Retail Value	= \$156,960	

A28

YELLOW FREIGHT
PROBILL #111-485917
(COUNT THREE)

Matrix # and Title	Fraction Copyrighted	Number of Records	Price	Fractional Value	Whole Value
Rockin Rebel (GA-250)	5/11	X	4025	X 9.98 =	\$ 18,076
				Fractional Value =	\$ 18,076
				Whole Value =	\$ 40,169

YELLOW FREIGHT
PROBILL #111-488237
(COUNT FOUR)

Matrix # and Title	Fraction Copyrighted	Number of Records	Price	Fractional Value	Whole Value
Behind Closed Doors (AFNS-66072-4)	39/49	x	2041	X 25.98 =	\$ 42,420
Command Performance (ECP-101)	8/18	X	1200	X 8.98 =	4,741
				Fractional Value =	\$ 47,161
				Whole Value =	\$ 63,801

A29

YELLOW FREIGHT
PROBILL #111-489972
(COUNT FIVE)

Matrix # and Title	Fraction Copyrighted	Number of Records	Price	Fractional Value	Whole Value
Behind Closed Doors (AFNS-66072-4)	39/49	X 3000	X 25.98 =	\$ 62,352	\$77,940
			Fractional Value =	\$ 62,352	
			Whole Value =	\$ 77,940	

YELLOW FREIGHT
PROBILL #507591
(COUNT SIX)

Matrix # and Title	Fraction Copyrighted	Number of Records	Price	Fractional Value	Whole Value
From The Waist Up (GA-150)	8/15	X 1670	X 8.98 =	7,948	\$14,996
Dorsey Shows (GA-100)	8/12	X 56	X 8.98 =	336	502
Command Performance (ECP-101)	8/18	X 276	X 8.98 =	1,090	2,470
Got a Lotta Livin to Do (PR-101)	21/26	X 549	X 8.98 =	3,993	4,930
68 Comeback (MKS-101)	12/16	X 1446	X 8.98 =	9,738	12,985
Legend Lives On (PCS-1001)	9/13	X 1314	X 8.98 =	8,141	11,799
			Fractional Value =	\$ 31,246	
			Whole Value =	\$ 47,682	

MC LEAN TRUCKING
PROBILL #170-1187305
(COUNT SEVEN)

Matrix # and Title	Fraction Copyrighted	Number Records	Price	Fractional Value	Whole Value
Rockin Rebel III (GA-350)	9/13	X 4668	X 9.98 =	32,144	\$46,586
Leavin' It Up to You (AFNS-66173)	10/12	X 4688	X 9.98 =	38,832	46,786
			Fractional Value =	\$ 70,976	
			Whole Value =	\$ 93,372	

A32

YELLOW FREIGHT
PROBILL #111-541345
(COUNT EIGHT)

Matrix # and Title	Fraction Copyrighted	Number of Records	Price	Fractional Value	Whole Value
Rockin Rebel III (GA-350)	9/13	X 5000	X 9.98 =	34,431	\$49,900
Leavin It Up to You (AFNS-66173)	10/12	X 5000	X 9.98 =	41,417	49,900
			Fractional Value =	\$ 75,848	
			Whole Value =	\$ 99,800	

YELLOW FREIGHT
PROBILL #111-507584
(COUNT NINE)

Matrix # and Title	Fraction Copyrighted	Number of Records	Price	Fractional Value	Whole Value
Dorsey Shows (GA-100)	8/12	X 1000	X 8.98 =	6,016	\$8,980
Got a Lot of Livin' to Do (PR-101)	21/26	X 1000	X 8.98 =	7,273	8,980
From the Waist Up (GA-150)	8/15	X 750	X 8.98 =	3,569	6,735
The 68' Comeback (MK-101)	12/16	X 750	X 8.98 =	5,051	6,735
The Legend Lives On (PCS-1001)	9/13	X 750	X 8.98 =	4,647	6,735
Command Performance	8/18	X 750	X 8.98 =	2,963	6,735
			Fractional Value =	\$ 29,519	
			Whole Value =	\$ 44,900	

A33

**(D) STIPULATION REGARDING TESTIMONY
OF JERRY GREENFIELD**

IT IS STIPULATED that Jerry Greenfield was called as a witness by the government and testified as follows:

Jerry Greenfield is general manager and custodian of records of the Radio Recorders division of the EMC Corporation. During the period 1964 through 1978, he managed the Radio Recorders Studios in Hollywood.

Elvis Presley made sound track recordings for most of his motion pictures at Radio Recorders. Radio Recorders was not authorized to release the master recordings or the outtakes that were produced in Presley's recording sessions except to its clients, the motion picture studios. All tapes were supposed to be delivered to the clients without copying and Radio Recorders was not authorized to make or release extra copies.

**(E) STIPULATION REGARDING TESTIMONY
OF JOHN HERMAN**

IT IS STIPULATED AND AGREED that John Herman was called as a witness by the government and testified as follows:

1. Herman is a policeman in Uniontown, Pennsylvania.
2. Herman is an Elvis Presley fan and, prior to Presley's death, attended several of his concerts. Herman frequently took pictures of Presley during the concerts and recorded the concerts for his personal use.
3. On New Year's Eve, 1976, Herman attended an Elvis Presley concert in Pittsburgh, Pennsylvania. Herman sat close to the front and took pictures of Presley while his father, who was sitting next to him, made a tape recording of the concert.

4. After the concert, Herman lent his tape recording and copies of his pictures to Paul Dowling. (Herman had previously corresponded with Dowling regarding Elvis Presley concerts and records).

5. In January, 1977, after he had sent the pictures and tapes to Dowling, Herman received a telephone call from William Samuel Theaker. Theaker asked Herman if he could borrow his negatives for the Pittsburgh New Year's Eve concert and told Herman that he wanted to hear the tapes. Herman responded that Dowling had the material but that he (Herman) did not want it copied.

6. Shortly after this conversation, Herman talked to Dowling on the telephone and learned that Dowling had sent the pictures and tapes to Theaker in California. Several months later, Herman received a Vic Colonna flyer in the mail advertising the album, "Rockin' With Elvis, Pittsburgh New Year's Eve." After receiving the flyer, Herman ordered the album and received a copy in the mail from Vic Colonna.

7. Several of the pictures on the album were identical to the ones Herman had lent Dowling and Theaker. In addition, when Herman listened to the album, he realized that his tape had been used as a source, because he could hear his parents voices.

8. After receiving the album, Herman telephoned Theaker in California and objected to the use of his pictures and tape to manufacture the album. Theaker responded that there was nothing wrong with using the pictures. With regard to the tape, Theaker told Herman that he had received a better tape from someone else and that, in any event, Herman should not worry because there was no way anybody would know that Herman had any connection with the album.

9. Plaintiff's Exhibit 742 is a chart on which two of the pictures Herman lent Dowling and Theaker are mounted on the right, and on which the front and back covers of the "Rockin' With Elvis Pittsburgh New Year's Eve" album are mounted on the left. The Herman pictures and the album cover pictures are identical.

10. Herman would not have allowed Dowling and Theaker to use his tape and pictures if he had known that they would use them in making a record.

**(F) STIPULATION REGARDING TESTIMONY
OF ALAN KRESS**

IT IS STIPULATED AND AGREED that Alan Kress was called as a witness by the government and testified as follows:

Alan Kress is Director, Talent Affairs of RCA Records, a Division of RCA Corporation ("RCA"). In that capacity, Kress is a custodian of records of RCA's records regarding artist agreements, licenses and licensing requests, including artist contracts which RCA has acquired. He is familiar with the catalogue of authorized Elvis Presley recordings and is familiar with industry practice regarding copyright and clearing house notices. From 1974 through 1979, Kress was counsel, RCA Records and was one of the attorneys responsible for Elvis Presley. Kress is trained in copyright law and has testified as an expert witness in federal and state courts.

By contract dated July 26, 1954 between Elvis Aron Presley and Sun Record Company, Inc. ("SUN"), Sun acquired the exclusive right to manufacture and distribute sound recordings containing Elvis Presley vocal performances.

By contract dated November 15, 1955 between Elvis Presley and RCA, RCA acquired the exclusive right to

manufacture and distribute sound recordings containing Elvis Presley vocal performances which were made after that date. Approximately one week later, on November 21, 1955 RCA acquired SUN's rights under its July 26, 1954 contract with Presley and acquired exclusive rights to all Presley vocal performances that SUN had recorded, whether or not the recordings had been released.

By virtue of these contracts, RCA obtained the exclusive right to manufacture and distribute Elvis Presley sound recordings made after July 26, 1954, the date of the original SUN contract.

In 1956 and 1973 RCA's exclusive recording contract with Presley was extended, and that exclusive right remains in effect at the present time.

Elvis Presley died in August, 1977. Under the terms of a March 4, 1973 contract, Presley's estate is entitled to receive royalties, through RCA, on all Presley recordings made after March 1, 1973.

Record manufacturers such as RCA Records, are required under the Copyright Acts of 1909 and 1976 to obtain mechanical licenses and to pay royalties to songwriters and publishing companies for records that manufacturers press which contain performances of copyright musical compositions belonging to the songwriters or publishing companies.

Persons and institutions (such as radio stations) which perform copyrighted musical compositions and sound recordings publicly are required to pay performance royalties to the copyright proprietors (songwriters and publishing companies). ASCAP and BMI are the two largest clearinghouses for receipt and distribution of performance royalties. It is RCA Records' practice and the custom in the industry to print the names of the appropriate clearinghouses on record jackets or labels in

order to notify radio stations and other performers where performance royalties are to be sent.

RCA Records has never authorized Paul Dowling, William Samuel Theaker, Vic Colonna, or William Richard Minor to manufacture Elvis Presley phonograph records, and no one has ever been authorized by RCA to manufacture or distribute the albums listed in the Aca Anderson stipulation at pp. 16 - 18.

RCA maintains all its Elvis Presley mastertapes including rehearsals and outtakes in secured premises and the release of the mastertapes has never been authorized, except for purposes of manufacturing and releasing authorized sound recordings and audio visual works.

On April 22, 1976, Kress sent Paul Dowling a letter (plaintiff's Exhibit 708), regarding "The '68 Comeback," "Good Rockin' Tonight," "Hillbilly Cat," "King Goes Wild," and "T.V. Guide Presents Elvis."

On August 11, 1976, Kress sent Vic Colonna at P.O. Box 29185, Los Angeles, California, a letter (plaintiff's Exhibit 709) regarding RCA's rights in Elvis Presley and the album "The Elvis Presley Dorsey Shows."

The letters advised Colonna and Dowling that manufacture and sale of the records infringed RCA and Elvis Presley's rights.

(G) STIPULATION REGARDING TESTIMONY OF HERBERT NUSBAUM

Herbert Nusbaum is attorney and custodian of records of Metro-Goldwyn-Mayer, Inc. ("MGM").

In 1963 MGM produced the motion picture *Viva Las Vegas*, starring Elvis Presley and Ann Margaret. MGM copyrighted the motion picture in conjunction with Jack Cumming's Productions, Inc. Plaintiff's Exhibit 681 is a certified copy of the copyright certificate.

MGM administers the *Viva Las Vegas* copyright and has never authorized anyone to issue a record album utilizing part or all of the *Viva Las Vegas* soundtrack.

Nusbaum has examined and listened to the album *Viva Las Vegas*, Plaintiff's Exhibit 215, and compared it to a print of the *Viva Las Vegas* motion picture. He concluded that bands 2-10 on side one and 2 through 6 on side two of the album were made by copying the soundtrack. Sound effects and background noises from the motion picture can be heard on these bands.

Elvis Presley recorded the songs on *Viva Las Vegas* for MGM, including outtakes, at the Radio Recorders Studio in Hollywood. No one at Radio Recorders or MGM was authorized to release the tapes, except to RCA Records. (RCA Records was never given tapes of songs in the movie which were performed by Ann Margaret.)

Nusbaum has also examined the album "Got A Lot O' Livin To Do," Plaintiff's Exhibit 233, and compared it to the MGM copyrighted motion picture *Jailhouse Rock*. Side one, bands 1(a) through (h), on the album were made by copying the *Jailhouse Rock* soundtrack. MGM never authorized anyone other than RCA Records to release record albums using the soundtrack. The "Got A Lot O' Livin To Do" album is unauthorized.

(H) STIPULATION REGARDING TESTIMONY OF JIM PROFETTA

IT IS STIPULATED AND AGREED that Jim Profetta was called as a witness by the government and testified as follows:

1. Jim Profetta is a dispatcher and custodian of records at Yellow Freight System, Inc. ("Yellow Freight") a trucking company located in the Los Angeles area in Sun Valley.

2. Yellow Freight provides shippers with blank bills of lading, which must be filled out by the shipper before Yellow Freight picks up the load.

3. Plaintiff's Exhibits 93 through 100 each contain a bill of lading and an attached delivery slip. In each case, the typed information in blue ink on the bills of lading was completed by the shipper. The remaining notations were placed on the bills of lading by Yellow Freight.

4. Plaintiff's Exhibit No. 93 indicates that on January 12, 1979, Paul Dowling, P.O. Box 4213, in Glendale, California shipped 503 cartons of records to Gloria Anderson, 817 Patapsco Avenue in Baltimore, Maryland and that the load was delivered on January 24, 1979 in Baltimore to Ace Anderson. At the time of delivery Anderson claimed that 15 cartons had been crushed and that 10 were wet and smashed. Plaintiff's Exhibit 240 is a Yellow Freight System, Inc. standard form for presentation of loss and damage claims that Ace Anderson submitted to Yellow Freight in order to be compensated for the damaged cartons. Plaintiff's Exhibits Nos. 238 and 239 are invoices Anderson submitted in support of the claim, in which he stated that the shipment consisted of 35 boxes of HNY-76-77, 52 boxes of GA-200, 64 boxes of GA-100, 80 boxes of LR-711, 80 boxes of AFNS-62768, 125 boxes of AFNS-62968, 51 boxes of PR-101, 11 boxes of GA-150, 12 boxes of GA-300 and 5 boxes of MK-101.

5. Plaintiff's Exhibit No. 94 indicates that on February 21, 1979 Paul Dowling, P.O. Box 4213 in Glendale, California shipped 115 cartons of records consisting of 4,025 copies of GA-250 to Gloria Anderson at 817 Patapsco Avenue in Baltimore, Maryland and that delivery was made to Ace Anderson on March 12, 1979 in Baltimore, Maryland.

6. Plaintiff's Exhibit No. 95 indicates that on March 2, 1979, Paul Dowling, P.O. Box 4213 in Glendale, California shipped 211 cartons of records consisting of 2,041 copies of 66072/4 and 1,200 copies of ECP-101 to Gloria Anderson at 817 Patapsco Avenue in Baltimore, Maryland and that on March 12, 1979 delivery was made to Ace Anderson in Baltimore.

7. Plaintiff's Exhibit No. 96 indicates that on March 14, 1979 Paul Dowling, P.O. Box 4213 in Glendale, California shipped 250 cartons of records consisting of 3,000 copies of 66072-4 to Gloria Anderson, 817 Patapsco Avenue in Baltimore, Maryland, and that on March 23, 1979 delivery was made to Ace Anderson in Baltimore.

8. Plaintiff's Exhibit No. 97 indicates that on June 4, 1979 Paul Dowling, P.O. Box 4213 in Glendale, California shipped 115 cartons of records consisting of 1,000 copies of GA-100, 1,000 copies of PR-101, 750 copies of GA-150, 750 copies of MKS-101, 750 copies of PCS-1001 and 750 copies ECP-101 to Richard Minor at 9415 S.W. 42nd Street in Miami, Florida and that delivery was made on approximately June 9, 1979 in Miami to W.J. Minor.

9. Plaintiff's Exhibit No. 98 indicates that on June 4, 1979 Paul Dowling, P.O. Box 4213 in Glendale, California shipped 129 cartons of records consisting of 1,670 copies of GA-150, 56 copies of GA-100, 549 copies of PR-101, 1,314 copies PCS-1001, 276 copies of ECP-101 and 1,446 copies of MKS-101 to Gloria Anderson at 817 Patapsco, in Baltimore, Maryland, and that delivery was made in Baltimore to Ace Anderson on June 18, 1979.

10. Plaintiff's Exhibit No. 99 indicates that on November 8, 1979 Mr. Paperback at 234 N. Brand in Glendale, California shipped 200 cartons of records consisting of

5,000 copies of GA-350 and 5,000 copies of AFNS-66173 to Richard Minor at 9415 S.W. 42nd Street in Miami, Florida and that delivery was made in Miami to Edna Minor on November 20, 1979.

11. Plaintiff's Exhibit No. 100 indicates that on December 10, 1979 Mr. Paperback at 234 N. Brand Boulevard in Glendale, California shipped 79 cartons of records to Gloria Anderson at 817 Patapsco, in Baltimore, Maryland and that delivery was made on December 31, 1979.

12. Plaintiff's Exhibits No. 769 through 774 are city pick-up/delivery manifest and mileage records which indicate where in the Los Angeles area Yellow Freight picked up the shipments referred to above. These records indicate that the January 12, 1979 records shipment was picked up at a "Records-Tempo" in Burbank, and that the remaining record album shipments were picked up at the H. V. Waddell Company in Burbank.

**(I) STIPULATION REGARDING TESTIMONY
OF DONALD ZACHARY**

It is stipulated and agreed that Donald Zachary was called as a witness by the government and testified as follows:

Zachary is an Attorney and Custodian of Records at NBC in Burbank, California. He is familiar with NBC's records regarding its production of the Elvis Presley Television Special in 1968, the "Aloha From Hawaii" Presley special in 1973 and the "Our Memories of Elvis" special in 1977. He is also familiar with NBC's procedures for storing and maintaining security of the tapes that were made (including outtakes) for these shows.

On June 27, 28, 29 and 30, 1968, NBC taped four Presley concerts at its Burbank, California studios for a December 3, 1968 Presley television special.

On January 13, 1973, NBC taped Elvis Presley's rehearsal concert for the "Aloha From Hawaii" special that was first broadcasted in the United States on April 4, 1973.

The tapes of the 1968 concerts and the Aloha Rehearsal Show were stored in NBC's vault. No one at NBC was authorized to release them publicly and NBC has never authorized anyone to manufacture records utilizing these tapes.

After Elvis Presley's death, NBC produced a retrospective television special entitled "Our Memories of Elvis." In order to assemble the show, it was necessary for NBC editors to be allowed access to the 1968 and 1973 Presley tapes. However the editors were not authorized to make copies of the tapes for their own or non-NBC use.

On September 6, 1978, the tapes were sold to Sarnoff International, on behalf of Presley's manager Colonel Parker.

**(J) STIPULATION REGARDING TESTIMONY
OF HARVEY ZIMMERMAN**

IT IS STIPULATED AND AGREED that Harvey Zimmerman was called as a witness by the government and testified as follows:

Harvey Zimmerman is a song writer who lives in New Jersey. As a song writer, he uses the professional name Bill Giant.

For approximately 20 years Zimmerman has been a member of a song writing team with two friends, Berney Baum and Florence Kaye. The Giant/Baum/Kaye song writing team wrote approximately 43 songs that were recorded and released by Elvis Presley.

One of the songs Zimmerman wrote for Elvis Presley was entitled "Plantation Rock." In 1962 or 1963 Presley

recorded the song on an acetate reference stub ("acetate") in the studio, but the song was never released publicly. Acetate reference stubs were used by musicians, record producers as song writers as an inexpensive means of making test or sample recordings before tape recorders were commonly available. The acetates could be played like records, but would wear down after a few playings.

Originally, Plantation Rock was to be included in one of Elvis movies, "Girls, Girls, Girls." When the decision was made not to include the song in the movie, Elvis' publisher, Freddie Benstock gave Zimmerman the acetate Elvis had recorded.

In 1979, Zimmerman saw an advertisement, Plaintiff's Exhibit 778, in which Paul Dowling offered to buy various type of Elvis Presley material, including "Unreleased songs on Sun or RCA" and "tapes and films of live shows in the 50's; Louisiana Hay Ride; . . . Dorsey shows . . . , Hawaii Benefit Show; etc."

In response to the add, in April 1979, Zimmerman called Dowling on the telephone and introduced himself. After a few minutes, Dowling conferenced in Ace Anderson on the call and Zimmerman, Anderson and Dowling had a lengthy discussion regarding Zimmerman's songs and various types of Presley memorabilia, including the acetate Zimmerman owned.

A few days after the telephone call, defendant Dowling and Anderson met with Zimmerman and Berney Baum at Zimmerman's New Jersey home. Zimmerman and Baum agreed to sell the Plantation Rock acetate to Dowling for Dowling's collection, for \$3,000. Dowling told Zimmerman that he was going to listen to the acetate once and then hang it on his wall with special lighting.

In April, 1979 Zimmerman, Baum and Kaye copyrighted Plantation Rock. Plaintiff's Exhibit 868 is a copy of the

copyright registration and Plaintiff's Exhibit 869 is a copy of the lead sheet, or unpublished sheet music which was deposited with the Library of Congress copyright office.

In September or October, 1980 Zimmerman saw a Vic Colonna catalog with the return address, P.O. Box 4158 in Glendale, California. Inside the catalog, there was an advertisement for the album "Plantation Rock", featuring "Plantation Rock, the Giant-Baum-Kaye song originally intended for the movie Girls! Girls! Girls! . . ." Plaintiff's Exhibit 779 is a copy of the catalog advertisement.

After seeing the add, Zimmerman obtained a copy of the Plantation Rock album and had his attorney write demand letters to Vic Colonna and Audifon at Vic Colonna's Glendale Post Office Box advising Colonna and Audifon that the record constituted an infringement of the "Plantation Rock" copyright. Plaintiff's Exhibit 65 and 66 are copies of the letters to Colonna and Audifon.

Colonna and Audifon did not respond to the letters.

Zimmerman made tape recording of the Plantation Rock acetate before selling it to Dowling. He has compared the Plantation Rock song on the Plantation Rock album, (Plaintiff's Exhibit 229) to the tape and has determined that the record was made by using the acetate or a tape of it.

Zimmerman and his partners had never authorized anyone to press or release a Plantation Rock album, and they have not received any royalties from its sale or manufacture. (On the copyright certificate for Plantation Rock, Zimmerman listed the name Bill Giant and his New Jersey address as the name and address to which correspondence regarding the copyright was to be sent. He is the partner responsible for approving licenses and royalties).

Zimmerman would not have sold Dowling and Anderson the acetate if he had known they were planning to use it to make a record.

**(K) STIPULATION REGARDING TESTIMONY OF
THRONE NOGAR**

IT IS STIPULATED that Thorne Nogar was called as a witness by the government and testified as follows:

Thorne Nogar is a Sound Engineer who worked at Radio Recorders and the Radio Recorders Annex (now known as the Annex Studios, which Nogar owns) since 1950.

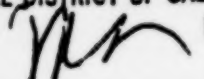
Elvis Presley made sound track recordings for most of his motion pictures at Radio Recorders and the Radio Recorders Annex, and Nogar participated in making the recordings. Radio Recorders was not authorized to release the master recordings or the outtakes that were produced in Presley's recording sessions except to its clients, the motion picture studios. All tapes were supposed to be returned to the clients.

(L) PAUL DOWLING

[The testimony of Paul Dowling on direct examination is set forth in the Record of Transcript at pages 87-112; The testimony of Paul Dowling on cross-examination is set forth in the Record of Transcript at pages 112-131.]

**IV
FINDINGS AND ORDER**

(A) COURT UNITED STATES DISTRICT FILED

UNITED STATES DISTRICT COURT	MAY 11 1983
CENTRAL DISTRICT OF CALIFORNIA	CLERK, U. S. DISTRICT COURT
UNITED STATES OF AMERICA,	CY  CENTRAL DISTRICT OF CALIFORNIA
Plaintiff,	DEPUTY
VS.	NO. CR 82-
PAUL DOWLING, et al.,	1005(B)-LTL
Defendants.	GENERAL FINDING
	AND
	ORDER

This matter is here for decision after trial to the Court without a jury and submission on May 5, 1983.

The Court finds the defendant Paul Edmond Dowling guilty as charged in Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 25, 26 and 27, and each of them.

Let judgment be entered accordingly.

It is ordered that the Federal Probation Service prepare a pre-sentence report with respect to defendant.

Sentencing is set for June 7, 1983 at 1:30 p.m. The defendant is ordered to appear for sentencing on June 7, 1983.

The Clerk of the Court will serve copies of this General Finding and Order by United States mail upon defendant and counsel of record.

DATED: This 11 day of May, 1983.

Lawrence T. Lydick
United States District Judge

**(B) OPINION OF THE COURT OF APPEALS
FOR THE NINTH CIRCUIT**

[The full text of the Opinion is set forth in Petitioner's Supplemental Appendix]

**V.
JUDGMENT AND COMMITMENT ORDER**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Defendant: PAUL DOWLING

Docket No. CR 82-1005-R
June 13, 1983

JUDGMENT AND PROBATION/COMMITMENT ORDER

With Counsel Michael Abzug, Retained

PLEA: Not Guilty

FINDING & JUDGMENT

There being a finding of: Guilty.

Defendant has been convicted as charged of the offense(s) of conspiracy, copyright infringement and mail fraud, in violation of 18, U.S.C., § 371, as charged in count one; interstate transportation of stolen property, in violation of Title 18, U.S.C., § 2314, as charged in counts two, three, four, five, six, seven, eight, nine, ten, eleven & twenty-seven; copyright infringement, in violation of Title 17, U.S.C., § 506(a), as charged in counts twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen, twenty-five and twenty-six of the First Superseding Indictment.

SENTENCE OR PROBATION ORDER

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

four (4) years on count one; four (4) years on counts 2, 3, 4, 5, 6, 7, 8 & 9 and a fine of \$5,000; one (1) year on counts 10, 11, 12, 13, 14, 15, 16, 17 & 18 and four (4) years on counts 25, 26 & 27.

(continued on next page)

(continued from previous page)

IT IS FURTHER ADJUDGED as to count 1, the jail-type sentence is suspended; count 2 the jail-type sentence only is suspended; counts 3-9 the jail-type sentence and fine are suspended and on counts 11-18 the jail-type sentence is suspended and the defendant is placed on probation for a period of five years on the conditions that he obey all federal, state and local laws; comply with all rules and regulations of the probation officer; keep and maintain the orders of the Court with respect to the jail-type sentence imposed; devote 1,500 hours to a charitable organization as approved by the probation officer and shall report to this Court in person once every one hundred and twenty days as arranged by the probation officer.

IT IS FURTHER ADJUDGED as to counts 25, 26 & 27, pursuant to 18, U.S.C., § 3651, the defendant shall be confined in a jail-type institution for the first six (6) months; the balance of the sentence is suspended under the same terms and conditions as counts 1-9.

IT IS FURTHER ADJUDGED that the sentence on counts 2-9 shall run concurrently and not consecutively to the sentence on count 1.

IT IS FURTHER ADJUDGED that the sentence on counts 10-18 shall run consecutively and not concurrently to the sentence on counts 25, 26 & 27.

COMMITMENT RECOMMENDATION

IT IS ORDERED that the sentence is stayed until July 11, 1983, 12 Noon, at which time the defendant is to surrender to the designated institution or in default thereof to the office of the United States Marshal at Los Angeles, California.

It is the intention of this judgment that the defendant serve 18 months in a jail-type institution and pay a fine in the amount of \$5,000.

Signed by: U.S. District Judge Manuel L. Real

Date: 6/13/83

VI
NOTICE OF APPEAL FILED

MICHAEL D. ABZUG
1900 Ave of the Stars
Suite 2512
Los Angeles, CA 90067
(213) 278-4984

JUN 21 12 40 PM '83
CLERK OF COURT
CENTRAL DISTRICT OF CALIF.
BY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

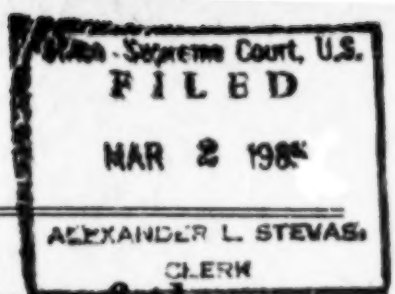
UNITED STATES OF AMERICA	)	CASE NUMBER
)	
Plaintiff	)	CR 82-1005(B)-R
)	
VS)	
PAUL EDMOND DOWLING	)	NOTICE OF APPEAL
)	
Defendant)	

PAUL EDMOND DOWLING hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered herein June 13, 1983 in the above-entitled action sentencing Defendant.

Dated: June 20, 1983 . _____
Attorney for Defendant

(CERTIFICATE OF SERVICE OMITTED IN
PRINTING)

(5)
No. 84-589



**In the Supreme Court of the
United States**

October Term, 1984

PAUL EDMOND DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED**I.**

WHETHER THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN CONCLUDING THAT THE INTERSTATE TRANSPORTATION OF RECORD ALBUMS CONTAINING COMPOSITIONS RECORDED WITHOUT THE CONSENT OF THE COPYRIGHT OWNERS CONSTITUTES THE TRANSPORTATION OF "STOLEN GOODS" WITHIN THE MEANING OF THE NATIONAL STOLEN PROPERTY ACT, 18 U.S.C. §2314?

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No. 84-589

**In the Supreme Court of the
United States**

October Term, 1984

PAUL EDMOND DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (Pet. Supp. App. A1-A12) is reported at 739 F.2d 1445.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 10, 1984. The petition for a writ of certiorari for the United States Court of Appeals for the Ninth Circuit was filed on October 9, 1984. This Court granted the Petition on January 14, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 8, of the United States Constitution provides, in pertinent part:

The Congress shall have the power . . . to Promote the Progress of Science and the useful Arts by securing for limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The National Stolen Property Act (NSPA), 18 U.S.C. §2314 (1982), provides, in pertinent part, as follows:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

* * *

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

* * *

Section 101 of the Copyright Act, 17 U.S.C. §101 (1976) and (1982), provides in pertinent part as follows:

"Copyright owners", with respect to any of one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

Section 102(a) of the Copyright Act, 17 U.S.C. §102(a) (1976), provides:

Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . .

* * *

Section 106 of the Copyright Act, 17 U.S.C. §106 (1976) and (1982), provides as follows:

Subject to sections 107 through 118, the owner of copyright under this Title has the exclusive rights to do and to authorize any of the following:

- (1) To reproduce the copyrighted work in copies or phonorecords;
- (2) To prepare derivative works based upon the copyrighted work;
- (3) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease, or lending;
- (4) In the case of literary, musical, dramatic, and choreographic work, pantomimes, and motion pictures and other audio-visual works, to perform the copyrighted work publically; and
- (5) In the case of literary, musical, dramatic, and choreographic work, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of the motion picture or other audio-visual work, to display the copyrighted work publically.

* * *

Section 202 of the Copyright Act, 17 U.S.C. §202 (1976) and (1982), states as follows:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copy-

right or of any exclusive rights under a copyright convey property rights in any material object.

Section 506 of the Copyright Act, 17 U.S.C. §501, entitled "Criminal Offenses" provides as follows:

(a) Criminal Infringement.

Any person who infringes a copyright willfully and for purposes of commercial advantage or private gain shall be fined not more than \$10,000 or imprisoned for not more than one year, or both. . .

(b) Forfeiture and Destruction.

When any person is convicted of any violation of subsection (a), the court, in its judgment of conviction, shall, in addition to the penalty described therein, order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices or equipment used in manufacturing such infringing copies or phonorecords.

Section 506(a) as amended by Pub.L. 97-180, 17 U.S.C. §506(a) (1982) provides:

Any person who infringes a copyright willfully and for purposes of commercial advantage or private gain shall be punished as provided in section 2319 of Title 18.

The Piracy and Counterfeiting Amendment Act of 1982, 18 U.S.C. §2319, is set forth, in pertinent part, in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, at pages 3-4.

STATEMENT OF THE CASE

A. Course of Proceedings

Following a stipulated facts trial in the United States District Court for the Central District of California, Petitioner was convicted of all 27 counts in the second superseding indictment, which alleged conspiracy to transport stolen property in violation of 18 U.S.C. §371 (Count One), interstate transportation of stolen property in violation of 18 U.S.C. §2314 (Counts Two through Nine), copyright infringement in violation of 17 U.S.C. §506(a) (Counts Ten through Twenty-Four), and mail fraud in violation of 18 U.S.C. §1341 (Counts Twenty-Five through Twenty-Seven). (*See, e.g.,* Jt. App. at A2-A13.)

On appeal, Petitioner did not contest his conviction on the misdemeanor copyright infringement counts. Rather, Petitioner contested his felony convictions and maintained, as he did before the District Court, that the sale of the materials in no way constitutes interstate transportation of stolen property or mail fraud within the meaning of 18 U.S.C. §§2314 and 1341. Inasmuch as this Court granted certiorari to review the propriety of only the interstate transportation of stolen property convictions, the mail fraud convictions are not at issue.

B. Summary of the Stipulated Facts

Petitioner has been a collector of Elvis Presley recordings for over ten years, having massed a record collection of over 2,000 titles (R.T. 87). He has obtained these recordings generally by purchase from, or trade with, other collectors located around the world (R.T. 89).

In 1976, Mr. Dowling became involved in the sale of Elvis Presley sound recordings as a business (R.T. 90). Mr. Dowling did so without the consent of copyright proprietors of the musical compositions which Elvis

Presley sang. At the stipulated facts trial, Mr. Dowling directly admitted that he manufactured and distributed albums (on certain label names not connected with any of the major record companies) containing the outtakes of Elvis Presley performances,¹ and he paid no royalties to holders of the composition copyrights (R.T. 90-112). Mr. Dowling made seven unauthorized albums: one from a concert tape, one from the sound tracks of two Presley motion pictures, and the others from studio outtakes and tapes of Presley television appearances.

Mr. Dowling utilized the services of Sund Services, an addressing and mailing service located in Glendale, California, which mailed over 50,000 catalogues and fliers advertising the phonorecords. (Jt. App. A14-15) Mr. Dowling's co-defendant collected the orders and then sent them to Mr. Dowling who mailed the requested albums from Maryland.

C. Summary of the Ninth Circuit's Decision

The Court of Appeals affirmed Petitioner's convictions (Pet. Supp. App. A1-A12 739 F.2d at 1450). Relying on *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1275 (1984) the Court of Appeals rejected Petitioner's argument that acts of copyright infringement could not be properly prosecuted under the National Stolen Property Act, (NSPA) 18 U.S.C. §2314. Petitioner argued that a copyright is not a "good, ware or merchandise" and that copyright infringement is not equivalent to conversion, stealing, or taking by fraud, within the meaning of the NSPA. The Court of Appeals concluded that, under the law of the *Belmont* case, a copyright is a "good, ware, [or] merchandise"

¹"Outtakes" are portions of tapes not used in the original edited broadcast. (Pet. Supp. App. A2 n.1)

within the meaning of the NSPA. The Court never reached the question of whether copyright infringement comes within the meaning of the terms "stolen, conversion, or taken by fraud." 18 U.S.C. §2314 (Pet. Supp. App. A10-11).

The Court of Appeals also declined to reconsider the *Belmont* holding in light of the Supreme Court's holding in *Sony Corp. of America v. Universal City Studios, Inc.*, ____ U.S. ____, 104 S.Ct. 774 (1983). *Sony* reaffirms the principle that the remedies for copyright infringement cannot be expanded by the judiciary absent clear legislative guidance. The Court reasoned that Petitioner had advanced no evidence that Congress intended to provide section 506 of the Copyright Act as the exclusive prosecutorial route within which to punish copyright infringement. (Pet. Supp. App. A-6).

SUMMARY OF THE ARGUMENT

1. Petitioner contends that the Court of Appeals' construction of the NSPA impermissibly expands the remedies for copyright infringement. Article 1, Section 8 of the Constitution mandates that only Congress shall have the power to remedy acts of copyright infringement. *Sony Corporation v. Universal Studios, Inc.*, ____ U.S. ____, 104 S.Ct. 774 (1983).

The issue in the instant case is whether Congress intended that acts of copyright infringement should be remedied by the National Stolen Property Act, 18 U.S.C. §2314. The Fifth and Ninth Circuit Courts of Appeals reached different conclusions as to whether section 2314's terms proscribed acts of copyright infringement. *Compare United States v. Dowling*, 715 F.2d 1445 (9th Cir. 1984) and *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1275 (1984) (meaning of National Stolen Property Act should be expanded to include copyrights and acts of copyright infringement), *with United States v. Smith*, 686 F.2d 234

(5th Cir. 1982) (the terms "goods, wares and merchandise", do not encompass intangible, incorporeal rights such as copyright, and terms "stolen, conversion, and taken by fraud" do not include acts of copyright infringement).

The Court of Appeals' reliance on *Belmont* to hold that Petitioner's acts of copyright infringement violated the National Stolen Property Act, 739 F.2d at 1450-51, was unsound in view of the principles set forth in *Sony Corporation of America v. Universal City Studios, Inc.*, ___ U.S. ___, 104 S.Ct. 774 (1983). The *Belmont* Court concluded that the unauthorized sale of videotape cassettes of copyrighted motion pictures, came within the meaning of the National Stolen Property Act, 18 U.S.C. § 2314, because, in its view, the law against transporting property needed to be expanded to include new kinds of property that thieves had devised new ways of appropriating. 715 F.2d at 461-62 (footnote omitted).

This reasoning of the *Belmont* Court, which the Court of Appeals relied upon (Pet. Supp. App. A10), demonstrates that the Ninth Circuit engaged in judicial legislating. The notion that the judiciary can expand the scope of a criminal statute to accommodate new forms of property and new forms of theft, especially in the context of the Constitution's direction that Congress has the power to remedy copyright infringement, is inconsistent with traditional principles of separation of power. *Sony Corporation of America v. Universal City Studios, Inc.*, ___ U.S. ___, 104 S.Ct. 774, 783 (1983). "The protection given to copyright is wholly statutory (citation)" and "[t]he remedies for infringement 'are only those prescribed by Congress.'" Quoting *Thompson v. Hubbard*, 131 U.S. 123 (1889) (emphasis added).

2. The Court of Appeals' view that Petitioner was required to demonstrate that Congress intended Section

506 to be an exclusive remedy for copyright infringement (see 739 F.2d at 1448) begs the question of whether Congress intended the National Stolen Property Act to encompass copyright infringement. This approach to statutory analysis is improper.

To determine whether Congress intended to remedy copyright infringement by enacting the NSPA, the terms of the NSPA must first be examined to assess their common sense or usual meaning. *Williams v. United States*, 458 U.S. 279, 285-87 (1982). If the conduct in question is not within the common sense or usual meaning of the statute's terms, but possibly may include the challenged conduct, the legislative history of the Act must be examined to determine Congress' intent to proscribe the conduct in question. See *id.* at 290. The rationale underlying this analysis is that criminal statutes must be strictly construed.

Application of this analysis, in light of the principle that the judiciary cannot expand the remedies for copyright infringements absent explicit legislative guidance, *Sony*, ___ U.S. at ___, 104 S.Ct. at 783, compels the conclusion that the Court of Appeals' decision must be reversed.

3. The usual and common sense meaning of the terms "goods, wares, [and] merchandise", in the National Stolen Property Act, does not include copyright. A copyright is an incorporeal, intangible right or privilege that is distinct from the physical or tangible object in which it is embodied. 17 U.S.C. § § 102(a), 202 (1976) and (1982). Goods, wares, and merchandise, on the other hand, connote a tangible object. U.C.C. § 2-105; *United States v. Smith*, 686 F.2d at 240. Accordingly, the terms goods, wares and merchandise, if given their usual or common sense meaning, do not include a copyright.

4. Similarly, the section 2314's terms "stolen, converted, or taken by fraud", do not encompass acts of copyright infringement. The usual or common sense meaning of these terms calls to mind a taking of something tangible. See *United States v. Turley*, 352 U.S. 407 (1957) (the term "stolen" in the National Motor Vehicle Transportation Act, 18 U.S.C. §2313, which prohibits transporting stolen motor vehicles across interstate lines, encompasses all felonious takings with intent to deprive the owner of the benefit and use of property accomplished by embezzlement, false pretenses and conversion); *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159 (2nd Cir. 1978) (National Stolen Property Act was designed to extend the provisions of the National Stolen Vehicle Transportation Act, therefore, the term "stolen" should be similarly construed).

The usual and common sense meaning of copyright infringement is that it is a *trespass* into, or interference with, the copyright holder's exclusive rights statutorily granted by section 106 of the Copyright Act, 17 U.S.C. §106(1)-(5). *Sony*, ____ U.S. at ____, 104 S.Ct. at 784. Thus, acts of copyright infringement are conceptually different from acts constituting felonious takings because the infringing activity does not *deprive* the owner of its rights, but, rather, interferes with those rights. Consequently, copyright infringement is not the equivalent of conversion. *Local Trademarks, Inc. v. Price*, 170 F.2d 715, 718 (5th Cir. 1948). Thus, acts of copyright infringement do not come within the meaning of the terms "stolen, converted, or taken by fraud." Cf. *United States v. Carman*, 577 F.2d 556 (9th Cir. 1978) (fraudulent scheme which reduces another's wealth by placing money out of reach of creditors is not stealing, taking by fraud, or conversion within the meaning of §2314).

5. Nothing in the legislative history of the National Stolen Property Act suggests that Congress intended to proscribe acts of copyright infringement. The legislative history contains no reference to copyright or copyright infringement activity.

The *Belmont* Court viewed the Piracy and Counterfeit Amendments Act of 1982, Pub. L. No. 97-180, (codified as amended at 18 U.S.C. §2319 (1982)), as evidence that Congress intended to permit prosecutions under the National Stolen Property Act. The Court of Appeals reasoned that because the Amendments provide that "such penalties shall be in addition to any other provisions of Title 17 or any other law," 18 U.S.C. §2319, and the National Stolen Property Act is "other law", Congress intended to expand the remedies for copyright infringement. (Pet. Supp. App. A5-6) Petitioner contends that because these amendments were enacted *subsequent* to Petitioner's acts of copyright infringement, Congress' decision to expand the remedies for copyright infringement by enacting the 1982 Amendments has no bearing on Petitioner's earlier in time conduct. *United States v. Bass*, 404 U.S. 336, 348 (1971); Cf. *Center for Auto Safety v. EPA*, 731 F.2d 16, 22 (D.C. Cir. 1984) (courts may not apply laws not yet written).

Moreover, the fact that Congress deemed it necessary to specifically provide felony punishment by enacting the 1982 Amendments is strong evidence that the felony provisions of other laws, such as the NSPA, were not thought, or intended, to be applicable to copyright infringement activity. The legislative history surrounding the Piracy and Counterfeiting Amendments Act of 1982 evinces Congress' belief that felony provisions of other statutes had no application to acts of copyright infringement at the time when Petitioner engaged in such conduct. Senate Bill 691 was amended to provide that its penalties were in addition to other law because the Bill, as

introduced, was unclear as to whether the penalties in the Bill were to supplement existing remedies or whether they were intended to be exclusive. S. Rep. No. 97-274, 97th Cong. 1st Sess. 1, 2 (1981), reprinted in 4 *U.S. Code Cong. & Ad. News* 127, 128 (1982). Thus, the Senate amended Senate Bill 691 to provide that the penalties of section 2319 would be in addition to any other provisions of Title 17 or any other law, "[to] clarif[y], for example, that the remedies contained in 17 U.S.C. §506(b) (relating to forfeiture and destruction) and those contained in 17 U.S.C. 509 (relating to seizure and forfeiture), would continue to apply to criminal infringements of a copyright." *Id.*

The legislative history of the 1982 amendments also reveals that both Congress and the Department of Justice believed that penalties for copyright piracy and counterfeiting were among the most lenient, "[a]s compared to other theft and forgery statutes . . ." *Id.* at 6, 4 *U.S. Code Cong. & Ad. News* at 132. It was precisely because the Senate Committee concurred with the view that the then existing penalties for film and record piracy and counterfeiting were too lenient that it concluded that Senate Bill 691, as amended, should be passed. *Id.* at 6-7, 4 *U.S. Code Cong. & Ad. News* at 132-33. Thus, the only inference to be drawn from enactment of the "in addition to other law" amendment, is that other law did not apply to acts of copyright infringement occurring before enactment of the 1982 amendments.

In sum, the legislature history of the 1982 amendments makes clear Congress' view that, at the time Petitioner committed the acts of copyright infringement, substantial felony penalties were unavailable. Consequently, these amendments do not support the Court of Appeals' decision in *Belmont*, or the decision in Petitioner's case. Since nothing in the legislative history of the National Stolen

Property Act provides clear legislative guidance that Congress intended to remedy copyright infringement, the Court of Appeals' decision must be reversed.

6. Petitioner also contends that other sound principles of statutory construction necessitate a reversal of the Ninth Circuit decision. The law is settled that where a general statute might be construed to relate to the same subject as does a more specific statute, the specific statute should apply to the exclusion of the general. *United States v. Carman*, 577 F.2d 556, 565 (9th Cir. 1978). Thus, even if a broad reading of the NSPA makes it plausible that acts of copyrights infringement are proscribed, the specific remedies for such activity set forth in 17 U.S.C. §506 (1976) renders that statute the more appropriate vehicle for prosecution of copyright infringement.

Another applicable principle is that where a choice is to be made between two readings of what Congress conduct has made a crime, Congress must speak in language clear and definite before the harsher alternative may be chosen. *Williams v. United States*, 458 U.S. 279, 290 (1982). In the instant case, application of the NSPA to Petitioner's copyright infringement activity increases the criminal penalties beyond that provided by Congress in the Copyright Act at the time of Petitioner's infringing activity. Compare 17 U.S.C. §506 (1976) (providing for a \$10,000 fine or imprisonment for not more than one year, or both) with 17 U.S.C. §506 (1982) and 18 U.S.C. §2319 (1982) (enacting felony provisions) and 18 U.S.C. §2314 (1982) (\$10,000 fine or imprisonment for not more than ten years, or both).

Congress' decision to enact felony provisions "in addition to other law," e.g. 18 U.S.C. §2319, occurred subsequent to Petitioner's acts of criminal copyright infringement. Thus, the only remedy afforded by the Copyright Statute at the time in question was the mis-

demeanor penalties set forth in section 506. 17 U.S.C. §506 (1976). Application of the NSPA's felony provisions to Petitioner's conduct is clearly the harsher choice of statutes, and absent clear direction from Congress, is improper. Since nothing in the legislative history of the NSPA provides clear legislative guidance that Congress intended to remedy or to proscribe acts of copyright infringement, the Court of Appeals decision must be reversed.

ARGUMENT

I

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN CONSTRUING THE NATIONAL STOLEN PROPERTY ACT, 18 U.S.C. §2314, TO PROSCRIBE ACTS OF COPYRIGHT INFRINGEMENT

A. Judicial Expansion of the National Stolen Property Act to Include a Remedy for Copyright Infringement Violates Article 1, Section 8, of the United States Constitution and Traditional Notions of Separation of Powers

Petitioner contends that the Court of Appeals construction of the NSPA impermissibly expanded the remedies for copyright infringement and encroached on Congress' lawmaking prerogative. Because the United States Constitution directs that only Congress has the power to remedy copyright infringement, the Court of Appeals decision violates traditional notions of separation of powers.

Article 1, Section 8 of the United States Constitution, provides as follows:

The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

In *Sony Corporation v. Universal City Studios*, ___ U.S. ___, 104 S.Ct. 774, 783 (1982), this Court explained that the Constitution empowers Congress to balance the competing interests of authors in the control and exploitation of their work and the interests of society in the free flow of information and ideas. "The direction of Art. 1 is that *Congress* shall have the power to promote the

progress of science and the useful arts . . . [thus,] the sign of how far Congress has chosen to go [in remedying copyright infringement] can only come from Congress." *Id.* 104 S.Ct. at 796, quoting, *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972) (emphasis in original.) Since "the protection given to copyright is 'wholly statutory' (citation)", the "remedies for infringement 'are only those prescribed by Congress.'" *Id.* at ____, 104 S.Ct. at 783, quoting *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889) (emphasis added). Thus, "the judiciary's reluctance to expand the protection afforded by the copyright laws without *explicit legislative guidance* is a recurrent theme." ____ U.S. ____ at ____, 104 S.Ct. 783 (citations omitted) (emphasis added).

Application of these principles in *Sony* led the Supreme Court to reject the view adopted by the Ninth Circuit that a federal copyright infringement claim could be premised upon the sale of a video-taped recording (VCR) to the general public for private home recording of broadcasted programs. In reaffirming the principle that only Congress has the power to remedy copyright infringement, the Supreme Court rejected the Ninth Circuit's suggestion of a judicially created remedy for copyright infringement. ____ U.S. ____, 104 S.Ct. at 796. See also *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*, 415 U.S. 394, 430 (1974) (shifts in current business and commercial relationships as a result of the copyright legislation in 1909 and changes in technology, while of significance, cannot be resolved by litigation, but rather, detailed regulation of relationships and resolution of problems should be left to Congress); *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 401 (1968) (Court rejected government's request for a compromise decision to accommodate various competing considerations of copyright, communication law, and anti-trust policy, stating that job is for Congress).

The Court of Appeals refused Petitioner's request to reconsider its holding in *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1275 (1984), in light of these principles (Pet. Supp. App. A10-11). In so doing, the Court of Appeals also ignored the well settled principle that the legislature, not the courts, should define criminal activity. *United States v. Bass*, 404 U.S. 336, 347-48 (1971). Just as the Ninth Circuit created a judicial remedy for copyright infringement in *Sony*, the Ninth Circuit has expanded the remedies for copyright infringement by broadly interpreting the National Stolen Property Act to proscribe acts of copyright infringement. The following quote from *Belmont*, set forth by the Court of Appeals in its decision rejecting Petitioner's argument, demonstrates this fact:

The rights of copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property. When society creates new kinds of property and thieves devise new ways of appropriating that property for their own use, the law against transporting property expands with the growth in the varieties of property. . . . A large percentage of the world supply of entertainment property is generated within this Circuit. If, indeed, the Fifth Circuit takes a different view of the matter, we are not bound to follow it.

United States v. Belmont, 715 F.2d 459, 461-62 (9th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1275 (1984) (footnote omitted) quoted in *United States v. Dowling*, 739 F.2d at 1450.

Petitioner contends that the Ninth Circuit's expansive interpretation of the National Stolen Property Act to include acts of copyright infringement violates traditional

notions of separation of powers and is tantamount to judicial legislating. *Cf. Center for Auto Safety v. EPA*, 731 F.2d 16, 22 (D.C. Cir. 1984) (not for court to apply laws not yet written). Only "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests. . .," *Sony* ____ U.S. at ____ 104 S.Ct. at 783, and to remedy copyright infringement.

The following discussion demonstrates that there is no explicit legislative guidance for the Ninth Circuit's decision. The fact that the Fifth and the Ninth Circuits² reached different conclusions as to the scope of the National Stolen Property Act demonstrates the lack of clarity as to the issue. Under these circumstances, Congress should be required to speak in a much more clear fashion before the courts apply the NSPA to acts of copyright infringement.

B. Neither the Language Nor the Legislative History of the National Stolen Property Act Clearly Demonstrate That Congress Intended to Proscribe or to Remedy Copyright Infringement Activity by Enacting the National Stolen Property Act.

B(1). In Resolving Whether Congress Intended the NSPA To Proscribe Acts of Copyright Infringement, the Statute's Terms Must First Be Examined, In Light of Their Common Sense Meaning, To Determine If the Terms Are Often Applied To Characterize The Challenged Conduct; If a Broad Reading of the Statute Suggests That The Statute's Terms May Include The Conduct At Issue, The Legislative History Must Then Be Examined To Determine Whether Congress Clearly Intended Such A Result.

²The Eleventh Circuit also has concluded that prosecution for copyright infringement is proper under Section 2314. *United States v. Drum*, 733 F.2d 1503 (11th Cir. 1984); *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984).

The Court of Appeals rejected Petitioner's argument that the NSPA's terms and legislative history lacked the clear legislative guidance necessary to remedy copyright infringement activity. The Court reasoned that Petitioner had failed to demonstrate that Congress intended Section 506 to be an exclusive remedy for copyright infringement. Petitioner contends that this view begs the question of whether the NSPA encompasses copyright infringement. Moreover, this approach to statutory construction is not legally sound.

Williams v. United States, 458 U.S. 279 (1982), illustrates the appropriate method for analyzing the scope of the National Stolen Property Act. In *Williams*, the Supreme Court held that a check kiting scheme did not come within Section 1014's proscription against knowingly making a false statement or wilfully overvaluing land, property or security for the purpose of influencing the action of Federally insured banks.

In determining that the Petitioner's course of conduct was not the equivalent of making a false statement, the Court first examined the usual and common sense meaning of the terms of the statute. The Court then looked to the definition of the term check as set forth in the Uniform Commercial Code adopted by the state in which the activity occurred. 458 U.S. at 284-285. The Court concluded that under this definition, a check is not literally a false statement. 486 U.S. at 286. Accordingly, the Court rejected the government's argument that since drawers of checks are generally understood to represent that funds exist sufficient to cover the face value of their checks, they effectively make false statements if there are insufficient funds to cover the checks when they are presented.

Although this broad reading of the statute was plausible, the Court was not persuaded "that it [was] the preferable or intended one." 458 U.S. at 286. To find otherwise, the Court

reasoned, would slight the wording of the statute; whatever the general understanding of a check's function, the term false statement is not, in common usage, often applied to characterize bad checks. *Id.* The Court refused to base an expansive reading of the statute on inferences drawn "from subjective and variable 'understandings' . . ." because the Court was interpreting a criminal statute which did not explicitly reach the conduct in question. *Id.* at 286 & n.7. The Court concluded that if Congress intended to reach this conduct, "it did so with a peculiar choice of language and in an unusually backhanded manner." *Id.* at 287.

Because the statute did not clearly demonstrate Congress' intent to reach the challenged conduct, the Supreme Court next examined the legislative history surrounding the act. *Id.* at 288-90. The Court first noted that bad checks were not among the "false statements" or "overvalued property" originally addressed by the statute. *Id.* at 288. Because subsequent amendments did not suggest that the statute should be applicable to anything other than representations made with conventional loan or related transactions, the Court determined that the legislative history of the Act did not demand a broader reading of the statute. *Id.* In so concluding, the Court emphasized the rule of lenity: "When choice has to be made between two readings of what Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Id.* at 290, quoting *United States v. Bass*, 404 U.S. 336, 347 (1971). The Court determined that statutory language much more explicit than that used was required to hold that Congress intended to proscribe the challenged conduct. 458 U.S. at 290.

Application of this analysis to the instant case compels the conclusion that Congress did not intend, in enacting the National Stolen Property Act, to proscribe the acts of copyright infringement. First, when the terms in the National

Stolen Property Act are given their usual and common sense meaning, it is clear that they do not reach conduct constituting copyright infringement. Second, the Court of Appeals' reliance on amendments to the Copyright Act, which were enacted subsequent to Petitioner's acts of copyright infringement, simply cannot provide authority for the view that the 1934 NSPA was intended to proscribe Petitioner's conduct. Moreover, the legislative history surrounding the 1982 Amendments demonstrates Congress' belief that felony provisions in the theft laws were inapplicable.

B(2) The Terms of the National Stolen Property Act, When Examined in Light of Their Usual or Common Sense Meaning, Do Not Clearly Encompass Copyrights

The NSPA prohibits the interstate transportation of "goods, wares [and] merchandise," that are known to be "stolen, converted, or taken by fraud." 18 U.S.C. §2314. The Second Superseding Indictment charges Petitioner under the NSPA as follows:

"[Defendant] knowingly and willfully caused to be transported in interstate commerce phonorecords of a value of more than \$5,000, containing Elvis Presley performances of copyrighted musical compositions, which phonorecords, as the [defendant] then and there well knew, were stolen, converted and taken by fraud, *in that they were manufactured without the consent of the copyright proprietors.* (Jt. App. A6-7, A8).

B(2)(a) A Copyright Does Not Constitute Goods, Wares, or Merchandise Within the Meaning of the National Stolen Property Act

Petitioner submits that the terms "goods, wares [or] merchandise" are not often used to characterize a copyright.

The reason for the lack of interchangeability between the terms is that they are conceptually different forms of property.

The Supreme Court has defined a copyright as “[a] limited . . . statutory monopoly . . .” *Sony*, _____ U.S. ____, 104 S.Ct. at 783, quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127. This monopoly privilege to use, reproduce and distribute the copyrighted work is neither unlimited, nor primarily designed “to provide a special private benefit.” *Id.* at ____, 104 S.Ct. at 782. Rather, it is “intended to motivate the creative activity of authors” so that the public will have access to the products of their creative genius after the limited period of exclusive control has expired. *Id.*

Black’s Law dictionary defines copyright in a similar manner:

“The right of literary property as recognized and sanctioned by positive law. An intangible, incorporeal right granted by statute to the author and originator of certain literary or artistic productions, whereby he is invested, for a limited period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.”

Black’s Law Dictionary, 304 (Rev. 5th Ed. 1979).

A copyright exists separate and apart from the physical object in which it is embodied. *See, e.g.*, 17 U.S.C. §§ 102(a) and 202. Section 201(a) of the Copyright Act provides that copyright protection “subsists . . . in original works of authors fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). Section 202 defines ownership of a copyright as distinct from ownership of any material object in which the work is embodied. 17 U.S.C. § 202.

Thus, copyrights in musical sound recordings are distinguishable from the underlying musical compositions which are transformed into aural form by the sound recording in the phonorecord, the material object on which the sound recording is recorded. M. Nimmer, *The Law of Copyright*, §2.10[A] (1982).

The principle that the copyright is distinct from its physical embodiment is reflected in various cases. *See, e.g., United States v. Smith*, 686 F.2d 234, 240 (5th Cir. 1982) (a copyright is independent of both its physical manifestation and the very thing that is copyrighted); *Local Trademarks, Inc. v. Price*, 170 F.2d 715, 718 (5th Cir. 1948) (copyright is an intangible incorporeal right in the nature of a franchise or a privilege and is independent of any material substance such as the manuscript or print therefrom); *cf. Werkmeister v. American Lithographic Company*, 142 F. 827, 830 (S.D.N.Y. 1905) (prior to publication, an author finished painting owns material piece of personal property consisting of the canvas and the paint upon it; he also owns an incorporeal right connected with it that is a right to make a copy of it); *see also Latern Press, Inc. v. American Publishers Company*, 419 F.Supp. 1267, 1271 (E.D.N.Y. 1976) (copyright is not identified with the copyrighted work; it exists separately from it as an intangible right to exclude all others from printing, publishing, copying, or vending the work); *King Brothers Productions, Inc. v. RKO Teleradio Pictures, Inc.*, 207 F.Supp. 271, 277 (S.D.N.Y. 1972) (same).

In sum, a copyright, together with the exclusive rights and privileges associated with the copyright, “does not implicate any tangible embodiment of the work.” *Smith*, 686 F.2d at 240 (footnote omitted). The copyright is distinct from the physical object in which it is embodied.

In marked contrast, the common or usual meaning of the phrase “goods, wares, and merchandise” encompasses

tangible, identifiable items, not intangible incorporeal property rights. Under the Uniform Commercial Code, adopted in California, goods are *not* general intangibles such as copyright. *Compare* U.C.C. § 2-105 (1978); Cal. Comm. Code § 2105 (West 1964) (goods means all things . . . which are movable at the time of identification to the contract for sale) *with* U.C.C. 9-106; Cal. Comm. Code § 9106 (West Supp. 1983) (general intangible includes any personal property, including things in action, "other than *goods*, accounts, chattel paper, documents, instruments, and money") (emphasis added). As the Fifth Circuit in *United States v. Smith* noted:

"Initially, a general dictionary definition reveals that a necessary element of goods, wares, and merchandise is that the item have a tangible existence. Black's Law Dictionary . . . has a specific listing for the phrase 'goods, wares, and merchandise.' The listing defines the phrase as '[a] general and comprehensive designation of such chattels and goods as are ordinarily subject of traffic and sale.' In turn, a 'chattel' is defined as '[a]n article of personal property, as opposed to real property. A thing personal and moveable. It may refer to animate as well as inanimate properties.' (Citation.) Black's defines the term 'goods' as including 'every species of personal property' or it may be given a very restricted meaning. [It includes] [i]tems of merchandise, supplies, raw materials, or finished goods. Sometimes the meaning of 'goods' is extended to include all tangible items as in the phrase 'goods and services.' (Citation)."

686 F.2d at 240.

The conceptual difference between the meaning of copyright ownership and the general definition of goods,

wares, or merchandise is striking. An incorporeal, intangible right or privilege, or grant to engage in or authorize certain activity, simply cannot be construed to be something tangible as is a good, ware, or merchandise.³ The common sense meaning of intangible property is that it is property other than *goods*. U.C.C. § 9-106; Cal. Comm. Code § 9106 (West Supp. 1983). Accordingly, section 2314's reference to "goods, wares and merchandise does not encompass intangible rights such as copyright. *Cf. United States v. Bottone*, 365 F.2d 389, 393 (2d Cir. 1966) ("To be sure, where no tangible objects were ever taken, a court would be hard pressed to conclude that 'goods' had been stolen and transported within the meaning of section 2314.") Accordingly, the Fifth Circuit correctly determined that these conceptual differences necessitated a finding that Section 2314 did not encompass copyrights. *United States v. Smith*, 686 F.2d at 240-41.

The Ninth Circuit in *Belmont*, and in Petitioner's case, 739 F.2d at 1450, rejected the reasoning of the Fifth Circuit in *United States v. Smith*,⁴ and implicitly concluded that Section 2314 included all personal property ordinarily subject to commerce. *See, e.g.*, 715 F.2d at 461 n.1.

³Because a copyright is separate and distinct from the tangible object in which the copyright is embodied, *United States v. Seagraves*, 265 F.2d 876 (3rd Cir. 1959) is distinguishable. There, the Third Circuit held that geographical maps were goods, wares, or merchandise within the meaning of 18 U.S.C. § 2314. Geographical maps consist of a drawing on paper, and the two items—the paper and the drawing—are inseparable. Unlike a copyright, a geographical drawing necessarily requires a physical embodiment for transfer. Transfer of that physical object, unlike transfer of the physical object in which a copyright exists, transfers all the rights to that property.

⁴The Eleventh Circuit has also rejected the result in *United States v. Smith*. *See, e.g., United States v. Drum*, 733 F.2d 1503 (11th Cir. 1984); *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984). The District of Columbia, in dictum, also suggested that prosecution of copyright infringement is proper under section 2314 *United States v. Whetzel*, 589 F.2d 707, 710 n. 10 (D.C. Cir. 1978).

Under the *Belmont* Court's interpretation, interference with another person's contract right or chose in action, could also be the subject of a Section 2314 conviction. Whatever the general understanding of the function of intangible rights, such as copyright, the terms "goods, wares and merchandise" are not, in common usage, often applied to characterize intangible property such as a copyright. Congress did not clearly state its intent otherwise when it enacted the National Stolen Property Act.

Petitioner recognizes that the different results reached by the Fifth and the Ninth Circuits suggests that the NSPA's application to copyright infringement is ambiguous. Although the Ninth Circuit's reading of the NSPA may be plausible, plausibility is a far cry from the clear or intended meaning of the statute. *United States v. Williams* dictates that, under these circumstances, the legislative history of the NSPA be examined to determine Congress' intent to proscribe copyright infringement by enacting the NSPA. Before engaging in this analysis, section 2314's reference to "stolen, converted, or taken by fraud" will be examined to determine if these terms are commonly applied to Copyright Infringement.

B(2)(b) Copyright Infringement is Not the Equivalent of Conversion, Stealing, or Taking by Fraud Within the Meaning of 18 U.S.C. §2314

Petitioner contends that because the nature of the ownership interest of one who holds a copyright is vastly different from one who owns tangible property, copyright infringement is not the equivalent of stealing, converting, or taking property by fraud as set forth in section 2314. Copyright infringement is a trespass into another's intangible incorporeal rights while 2314's reference to stealing, conversion and taking by fraud connotes a deprivation of tangible property.

The Copyright Act grants the holder of a copyright the exclusive right to use and to authorize the use of the work, including reproduction in qualified ways. *Sony*, ____ U.S. ____ at ____, 104 S.Ct. at 784 & n.13. Unlike the law governing tangible property, copyright protection has never accorded the copyright owner complete control for all possible uses of the work. *Id. Accord Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968). See also *20th Century Corporation v. Aiken*, 422 U.S. 151, 155 (1974) (an unlicensed use of a copyright that does not conflict with an exclusive right conferred by statute is not an infringement of the holders' rights; no license is required by the Act to sing a copyrighted lyric in the shower) (footnote omitted). cf.; *Durham Industries, Inc. v. Sony Corporation*, 630 F.2d 905 (2nd Cir. 1980) (purpose of the copyright statute is to protect original designs from copying, not to convey to proprietor any right to exclude others from the market).

Because of the nature of the ownership interest of one who holds copyright is vastly different from one who holds tangible property, a violation of the former is conceptually distinct from the stealing of tangible property. In *Sony*, the Supreme Court explained that a violation of the copyright holder's exclusive right — that is, an infringement of the copyright — is a *trespass* into the author's exclusive rights. 104 S.Ct. at 784.

Consequently, courts considering the question have rejected the notion that copyright infringement is tantamount to conversion.⁵ See, e.g., *Local Trade Marks, Inc. v. Price*, 170 F.2d 715, 718 (5th Cir. 1948); (copying of books was not a conversion of the books themselves, but at

⁵ Similarly, copyright infringement by the United States is not a taking for purposes of due process just compensation jurisprudence. *Porter v. United States*, 473 F.2d 1329, 1337 (5th Cir. 1973).

most was an invasion of plaintiff's common law copyright which is an intangible incorporeal right that exists separate and apart from the property in the paper on which it is written or the physical substance in which it is embodied); *King Brothers Production, Inc. v. RKO Teleradio Pictures, Inc.*, 208 F.Supp. 271, 277 (S.D.N.Y. 1962) (because literary property is intangible and incorporeal in nature, existing separate and apart from the physical form in which it was embodied, it cannot be the subject of an action for conversion in the strict sense of the word).

The analogy between stealing, converting, or taking by fraud and copyright infringement is simply not appropriate. In *Sony*, the Supreme Court noted that the use to which stolen property is put is "quite irrelevant in determining whether depriving its true owner of his present possessory interest in it is venial; because of the nature of the item and the true owner's interest in the physical possession of it, the law finds that taking objectionable, even if the thief does not use the item at all." ____ U.S. at ____, 104 S.Ct. at 793 n. 33. Theft of a particular item of personal property, the Court noted, "may have commercial significance, for the thief deprives the owner of his right to sell that particular item to any individual." *Id.*

In marked contrast, the use to which a copyright is put is relevant to determining whether an infringement has occurred. Copyright infringement arises solely if the use to which the copyrighted article is put violates one of the enumerated exclusive rights in Section 106 of the Copyright Act. *E.g.*, 17 U.S.C. § 106(1)-(5). Copyright protection "has never accorded the copyright owner complete control over all possible uses of his work." *Sony*, ____ U.S. ____, 104 S.Ct. at 784 (footnote omitted).⁶ Copyright infringe-

⁶See *e.g.*, 17 U.S.C. §§ 106 and 107 for uses which are not considered copyright infringement.

ment simply does not *deprive* the owner of property; rather, it is a trespass into the holder's exclusive rights. Consequently, it does not come within the meaning of Section 2314. *Cf. United States v. Carman*, 577 F.2d 556 (9th Cir. 1978).

In *Carman*, the Ninth Circuit refused to extend section 2314 to a fraudulent scheme which reduced another's wealth by placing money out of the reach of creditors. The Ninth Circuit held that fraudulent conduct which placed money out of the reach of creditors does not constitute stealing, conversion, or taking by fraud within the meaning of section 2314. The *Carman* Court further reasoned that the specificity of another criminal statute covering the conduct at issue therein strongly suggested that the restrictive interpretation of section 2314 " 'should not be expanded at the government's will beyond the connotation — depriving an owner of his rights and property — conveniently called to mind.' " 577 F.2d at 565 (citation omitted) (emphasis added). The Court refused to make criminal a form of commercial dishonesty because ambiguities in criminal statutes are resolved in a defendant's favor. *Id.*

Petitioner submits that his acts of copyright infringement are analogous to the conduct in question in *Carman*. Because Petitioner's acts of copyright infringement did not deprive the copyright owners of their rights, but rather, constituted a trespass of those rights, Petitioner's activities do not constitute acts of stealing, conversion, or taking by fraud, within the meaning of section 2314. *See, e.g., United States v. Turley*, 352 U.S. 407 (1957).

In *Turley*, the Supreme Court construed the meaning of the term "stolen", as set forth in the National Motor Vehicle Theft Act, 18 U.S.C. § 2313. In concluding the term stolen included felonious takings accomplished by

embezzlement, false pretenses and conversion, the Court looked to Black's Law Dictionary for the definition of "steal". 352 U.S. at 412 (citing Black's Law Dictionary (4 ed. 1951)). Black's Law Dictionary defines the term "steal" as a term that is:

"[C]ommonly used in indictments for larceny ('take, steal, and carry away'), and denotes the commission of theft that is, the felonious taking and carrying away of the personal property of another, and without right and without leave or consent of the owner, with intent to keep or make use wrongfully. . . . Or, it may denote the criminal taking of personal property either by larceny, embezzlement, or false pretenses. But in popular usage, stealing may include the unlawful appropriation of things which are not technically the subject of larceny, e.g., immovables."

Black's Law Dictionary at 1267 (5th Ed. 1979) (emphasis in original) (citations omitted.) *See also United States v. Long Cove Seafood, Inc.*, 58 F.2d 159 (2nd Cir. 1978) (not all illegal takings come within the purview of 18 U.S.C. §2314).

As noted by the Fifth Circuit in *United States v. Smith*, this definition contemplates a removal of something tangible. 686 F.2d at 242. Moreover, the definition contemplates that whatever is removed is actually owned or in someone's possession. *Id.* The definitions of conversion and taking are similar. Conversion is defined by Black's Law Dictionary as:

An authorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of another's rights.

Any unauthorized act which deprives an owner of his property permanently or for an indefinite time

Black's Law Dictionary at 303 (5th Ed. 1979)

To "take" is defined by Black's as "to lay hold of; to gain or receive possession; to seize; to deprive one of the use of possession of [something]; or to assume ownership." *Id.* at 1303. Black's also defines taking as described in the law of larceny: "To obtain or assume possession of a chattel unlawfully and without the owner's consent. . . ." *Id.*

These definitions demonstrate *why* the terms "stolen, converted, or taken by fraud" are *not* generally used to connote copyright infringement. These definitions all concern the deprivation of something tangible. Copyright infringement is simply not a deprivation of some tangible property. The instant indictment amply illustrates this fact.

Each of the counts charging Petitioner with a violation of the National Stolen Property Act allege that Petitioner "knowingly transported in interstate commerce phonorecords containing Elvis Presley's vocal performances of copyrighted musical compositions, knowing that the phonorecords were stolen, converted and taken by fraud, *in that they were manufactured and intended to be distributed to the public without the consent of the copyright proprietor . . .*" (Jt. App. at A6-7, A8)(emphasis added). Thus, the stealing, conversion, or taking by fraud, as alleged in the indictment, is the fact that Petitioner *distributed* the phonorecords without the consent of the copyright proprietors. This distribution, however, did not *deprive* the holders of their copyrights; rather it interfered with their exclusive rights to distribution.

Accordingly, *how* Petitioner initially acquired the physical object in which the copyrights to musical compositions

were embodied is irrelevant for purposes of the analysis here. Petitioner was not indicted for his acquisition of Presley recordings; rather, it was the use to which Petitioner put the copyrighted compositions that constituted the crime.⁷ Petitioner submits that the acts of copyright infringement at issue here — distribution of phonorecords containing copyrighted musical compositions — are not the equivalent of stealing, converting, or taking by fraud within the meaning of the National Stolen Property Act.

B (3) The Legislative History of the National Stolen Property Act Does Not Provide Clear Legislative Guidance That Congress Intended the National Stolen Property Act to Include Acts of Copyright Infringement

The National Stolen Property Act was an extension of the National Motor Vehicle Theft Act, 18 U.S.C.A. §2312, which was passed in response to the growing number of automobile thefts in the United States. *See, e.g., United States v. Smith*, 686 F.2d 234, 245 (5th Cir. 1982); *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159, 163 (2nd Cir. 1978). In *United States v. Turley*, 352 U.S. 407 (1957), the Court explained that the National Motor Vehicle Theft Act was concerned with the stealing or theft of tangible chattels. The Court examined, at length, the legislative history of the Act. The House Report describes the intended reach of the statute in conventional terms — i.e., the removable of tangible

⁷The Fifth Circuit in *United States v. Belmont*, suggests that a difference exists between copyright infringement accomplished by taping broadcasts “off the air” and stealing an original copy. 686 F.2d at 241-242. Thus, the Fifth Circuit distinguished cases where it was proven that stolen originals were moved in interstate commerce. This distinction is irrelevant to the case at bar, because the act of stealing, conversion, or taking by fraud alleged in the indictment is the act of copyright infringement, not the acquisition of the physical object in which the copyright is embodied.

property from the owner’s possession. *Id.* at 414 n.13. The National Stolen Property Act has been similarly described. *See United States v. McClain*, 545 F.2d 988, 994-95 (5th Cir. 1977). The Act “was intended to aid the states, which, because of jurisdictional limitations, could not prosecute the receivers or thieves of stolen property after that property moved across state lines. *Id.*, citing *United States v. Sheridan*, 329 U.S. 379, 384 (1946). *See also* 78 Cong. Rec. 2947 (1934) (remarks of attorney general Homer Cummings) (criminals have made full use of the improved methods of transportation and communication and have taken advantage of the limited jurisdiction possessed by the State authorities in pursuing fugitive criminals). The NSPA has been characterized as being modeled after the NMVTA. *United States v. Sheridan*, 329 U.S. 379, 383 n.9.

The legislative history of the 1934 National Stolen Property Act simply fails to provide evidence that Congress was aware of the statute’s claimed scope to cover acts of criminal copyright infringements. Rather, it suggests that the Congress was concerned with tangible property that could be easily moved across state lines. Copyrights and copyright infringement are never mentioned in the legislative history of the National Stolen Property Act. As the Court in *United States v. Smith* noted, “there would be no need for Congress to utilize the commerce clause in order to gain jurisdiction over activities involving copyrights [since the Constitution] grants Congress jurisdiction over copyright activity, and Congress had been utilizing the authority for several years prior to the 1934 National Stolen Property Act. Copyright infringing activity was already federalized and controlled with specific legislation.” 686 F.2d at 248.

In 1976, when Congress passed the 1976 Copyright Act, no felony provisions were part of that Act, although

Congress had been requested to include felony punishment in its comprehensive revision of the copyright laws. Omnibus Copyright Revision: Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 94 Congress, 1st Sess. 716 (1975) (statement of Jack Valenti). Felony provisions were not enacted until 1982 — *after* the copyright infringement conduct at issue in the instant case. Thus, these amendments have no application to the conduct at issue here. Petitioner submits, however, that these Amendments demonstrate that Congress did not believe that the felony provisions of any law applied to copyright infringement prior to the enactment of the 1982 amendments.

The Court of Appeals for the Ninth Circuit in *Belmont* and in Petitioner's case, adopted a markedly different analysis of the 1982 amendments. The Ninth Circuit concluded that the 1982 amendments, which were enacted subsequent to the copyright infringement acts of Petitioner at issue here, evidenced Congress' intent that §2314 proscribed acts of copyright infringement. The Ninth Circuit reasoned that because the 1982 amendments were adopted "in addition to other law", and section 2314 is "other law," Petitioner's copyright infringement could be prosecuted under section 2314. *Belmont*, 715 F.2d 461; *Dowling*, 739 F.2d. The Ninth Circuit's conclusion is faulty for several reasons.

First, as noted earlier, the 1982 amendments were enacted subsequent to Petitioner's copyright infringing activity. Petitioner clearly could not be prosecuted under these amendments. Second, although section 2319, as amended, provides that its remedies are in addition to other law, the legislative history of section 2319 makes clear that this language was included to clarify "that the remedies contained in 17 U.S.C. §506(b) (relating to

forfeiture and destruction) and those contained in 17 U.S.C. §509 (relating to seizure and forfeiture) would continue to apply to criminal infringements of a copyright." S. Rep. No. 97-274, 97 Cong., 1st Sess. 2 (1981), reprinted in 4 U.S. Code Cong. & Ad. News 128 (1982). The necessity for the clarifying amendment was because the Act, as introduced, was "unclear [as to] whether the penalties in the bill were to supplement existing remedies, or whether they were intended to be exclusive." *Id.*

Third, the legislative history makes clear that both the Congress and the Department of Justice believed that the current copyright laws were too lenient to provide an effective deterrent to copyright infringement activity. The Senate Committee noted that:

"In testifying before this Committee, the Department of Justice made clear its view that the penalties under current laws are too lenient to provide an effective deterrent. The Department stated:

As compared to other theft and forgery statutes, penalties for copyright, piracy and counterfeiting are among the most lenient, while these schemes are among the most lucrative. . . .

* * *

The committee concurs with the view that the current penalties for the film and record piracy and counterfeiting are too lenient and, for that reason, recommends the passage of S. 691. This legislation should help to fight the recent increase in piracy and counterfeiting by substantially increasing the allowable penalties for those crimes.

* * *

The current penalty for criminal infringement of a copyright in works other than sound

recordings or motion pictures is a maximum of one year in prison and/or a fine of \$25,000. . . .

S. Rep. No. 97-274, 97 Cong., 1st Session 6, 10 (1981), reprinted in 4 U.S. Code Cong. and Ad. News, 132-33, 136 (1982) (emphasis added).

Thus, the amendments indeed do evidence Congress' belief that the then current law — that is, the law applicable to Petitioner's conduct — did not include felony provisions of other laws. If, as the Ninth Circuit concluded, *see, e.g.*, (Pet. Supp. App. at A9-10), Section 2314 proscribes copyright infringement, the Piracy and Counterfeiting Amendment Act of 1982 would have been unnecessary. As the Fifth Circuit noted in *United States v. Smith*:

"The necessity for these increased punishment provisions was Congress' apparent belief that no felony punishment provisions applied to copyright infringing activities, including the interstate trafficking of private works. . . .

* * *

This recent Congressional activity in the area of copyright infringement demonstrates Congress felt a significant need to provide more stringent punishment for various forms of infringement. The specific 1976 Copyright Act, although a comprehensive revision of copyright law, failed to provide the necessary punitive measures. Of course, the Piracy and Counterfeiting Amendment Act of 1982 would have been unnecessary if the NSPA section 2314 — which provides for \$10,000 fines and/or ten years of imprisonment — were available."

686 F.2d at 248-49.

The legislative history of the 1934 NSPA contains no reference to copyrights or criminal infringement. The legislative history of the 1982 Piracy and Counterfeiting Amendments Act, which was enacted as a new section of the stolen property chapter, demonstrates Congress' belief that felony provisions of other laws had no application to criminal infringement prior to enactment of the Amendments. The legislative history of the NSPA simply fails to provide clear legislative guidance that criminal infringement comes within its purview. Where, as here, both readings of § 2314 are plausible, and the legislative history of the NSPA fails to provide clear guidance, statutory language much more explicit than that utilized in the NSPA should be required before finding that Congress intended to proscribe copyright infringement in enacting the National Stolen Property Act. *Williams v. United States*, 458 U.S. 279, 290 (1982).

C. Assuming That A Broad Reading Of The NSPA Would Encompass Acts Of Copyright Infringement, Sound Principles Of Statutory Construction Dictate That The Specific Remedies Provided For In Section 506 Of The Copyright Act, 17 U.S.C. § 506 (1976) Be Chosen As The Appropriate Vehicle For Prosecution Of Criminal Copyright Infringement Activity

The law is settled that where a general statute might be construed to relate to the same subject as does a more specific statute, the specific statute should apply to the exclusion of the general. *United States v. Carman*, 577 F.2d 556, 565 (9th Cir. 1978); *Kniess v. United States*, 413 F.2d 752 (9th Cir. 1969). These cases stand for the proposition that where a defendant's conduct falls within the literal language of either of two statutes, one specific and one general, the government must prosecute such conduct under the specific statute. Here, the copyright

statute, 17 U.S.C. §506, specifically applies to acts of criminal copyright infringement. Thus, even if a broad reading of the NSPA renders it plausible that acts of copyright infringement are proscribed, the specific remedies set forth in 17 U.S.C. §506 (1976) for such conduct makes the Copyright Act the more appropriate vehicle for prosecution of criminal copyright infringement.

The second applicable principle is that when a choice is to be made between two readings of what conduct Congress has made a crime, Congress must be required to speak in a language that is clear and definite, before the Courts choose the harsher alternative. *Williams v. United States*, 452 U.S. 279, 290 (1982). This principle is founded on two well-established policies. The first is that “ ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.’ (citation)” *United States v. Bass*, 404 U.S. at 348. The second principle is that because criminal punishment represents moral condemnation of the community, the legislature and not the courts should define criminal activity. *Id.* In the instant case, an interpretation of Section 2314 to encompass copyright infringements would impermissibly increase the criminal penalties for such conduct beyond that prescribed by Congress in the Copyright Act, 17 U.S.C. §506(a) and (b). At the time Petitioner committed the acts of copyright infringement, Congress had not yet increased the penalty for copyright infringement to include a felony provision.

It was not until May 24, 1982, that the President signed into law piracy and counterfeiting amendments of 1982, Pub. L. No. 97-180, 96 stat. 91, (codified at 18 U.S.C. §2319). The Ninth Circuit erred in inferring that these Amendments demonstrate that Congress intended the

NSPA to encompass criminal infringement activity prior to enactment of these Amendments. The application of these Amendments to buttress Petitioner's felony convictions under section 2314 is improper. “This policy embodies the ‘instinctive distaste against men languishing in prison unless the law maker has clearly said they should.’ (citation)” *United States v. Bass*, 404 U.S. at 348.

II CONCLUSION

For the reasons set forth in the instant brief, Petitioner respectfully requests this Court to reverse the decision of the Court of Appeals for the Ninth Circuit which affirmed Petitioner's convictions for interstate transportation of stolen property (Counts Two through Nine of the second superseding indictment) in violation of 18 U.S.C. §2314.

Respectfully submitted,

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PAUL EDMOND DOWLING

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on February 28, 1985, I served the within *Brief for Petitioner and Joint Appendix* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and 40 copies)

Solicitor General
Department of Justice
Washington, D.C. 20530
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

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MAR 29 1985

No. 84-589 (6)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

PAUL EDMOND DOWLING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion & **BRIEF OF AMICUS CURIAE
RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.
IN SUPPORT OF RESPONDENT**

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Motion for Leave to File
Brief Amicus Curiae and Brief Amicus Curiae

The Recording Industry Association of America, Inc. (hereinafter "RIAA"), hereby respectfully moves for leave to file the attached brief, as *amicus curiae* in this case. The consent of the attorney for the Respondent has been obtained. The consent of the attorney for the Petitioner was requested. The attorney for the Petitioner stated that he is not willing to consent to the filing of the attached brief. He further stated, however, that if this Court finds the attached brief to be helpful, he would have no objection to its being filed.

RIAA is a not-for-profit New York corporation, whose membership consists of recording companies accounting for more than 85 percent of the authorized prerecorded records and tapes manufactured and sold in the United States. Among RIAA's purposes is to represent its membership before legislative, regulatory and judicial bodies with respect to federal, state and local legislation and regulations affecting the entire recording industry.

The RIAA is actively engaged in a far-reaching program aimed at curtailing illegal practices relating to record piracy in its various forms. To this end, the RIAA maintains an Anti-Piracy Unit consisting of a Director of Anti-Piracy Operations, attorneys and a nationwide staff of investigators, to collect and collate piracy information on a national scale for dissemination to federal, state and local law enforcement and other government agencies and recording companies. The Anti-Piracy Unit seeks to develop findings which lead to effective enforcement of federal and state laws which protect its members' rights by prohibiting, along with other forms of "piracy", bootlegging and the unauthorized duplication of musical compositions. It also seeks to obtain federal legislation providing for more effective anti-piracy protection through the facilitation of enforcement of copyright laws for musical compositions and increased criminal penalties for convicted pirates, counterfeiters and bootleggers, and seeks to secure the enactment and enforcement of state anti-piracy laws.

In the instant case, the issues presented concern whether copyrights can constitute goods, wares or merchandise capable of being stolen, converted or taken by fraud within the meaning of 18 U.S.C. Section 2314. As representatives of recording companies whose interests in intellectual property include the ownership of thousands of copyrights, it is believed that the brief which the RIAA as *amicus curiae* is requesting permission to file will contain a discussion of how intellectual property, including copyrights, are treated as valuable assets in commerce by their owners, as well as the legal recognition of the same.

As a national trade association representing members doing business involving intellectual property in all 50 states, it is of vital importance to our membership that a conflict among the circuit courts involving a key issue regarding the treatment of the theft of their intellectual property be resolved.

Respectfully submitted,

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IN THE
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PAUL EDMOND DOWLING,

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UNITED STATES OF AMERICA,

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF AMICUS CURIAE
RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.
IN SUPPORT OF RESPONDENT**

The Recording Industry Association of America, Inc. (hereinafter "RIAA") hereby submits this brief *amicus curiae* in support of the Respondent.

INTEREST OF AMICUS CURIAE

RIAA is a not-for-profit New York corporation, whose membership consists of recording companies accounting for more than 85 percent of the authorized prerecorded records and tapes manufactured and sold in the United States. Among RIAA's purposes is to represent its membership before legislative, regulatory and judicial bodies with respect to federal, state and local legislation and regulations affecting the entire recording industry.

In its quest for protection of intellectual property including sound recordings and musical compositions, the RIAA is actively engaged in a far-reaching program aimed at curtailing illegal practices such as piracy, bootlegging and counterfeiting.¹ The scope of RIAA's efforts includes: maintaining an Anti-Piracy Unit consisting of a Director of Anti-Piracy Operations, attorneys and a nationwide staff of investigators, to collect and collate "piracy" information on a national scale for dissemination to federal, state and local law enforcement and other government agencies and recording companies; developing findings which lead to effective enforcement of federal and state laws which protect its members' rights by prohibiting, along with other forms of "piracy", bootlegging and the unauthorized duplication of musical compositions; seeking to obtain federal legislation providing for more effective anti-piracy protection through the facilitation of enforcement of copyright laws for musical compositions and increased criminal penalties for convicted pirates, counterfeiters and bootleggers; seeking to secure the enactment and enforcement of state anti-piracy laws; seeking to achieve the United States adherence to international anti-piracy and copyright treaties; cooperating with anti-piracy enforcement programs in foreign nations and working closely with

¹ In the recording industry, the following terms are used to define illicit recordings of sounds:

a. *Piracy*: The unauthorized duplication of sounds contained in a legitimate recording. The term "piracy", in a generic sense, is sometimes used to connote all forms of unauthorized recordings.

b. *Counterfeiting*: The unauthorized duplication not only of the recorded sounds contained in a legitimate recording but also of the label, art work, trademark and packaging of the original recording.

c. *Bootlegging*: The unauthorized recording of a performance that is not legitimately available. Bootlegs are commonly reproductions of concerts or studio outtakes not intended for release. Such bootleg versions are sometimes referred to as "underground" recordings. The term bootleg is sometimes incorrectly used to connote piracy or counterfeiting.

d. *Pirate Compilation*: The duplication of popular sound recordings usually by different artists all on one phonorecord not bearing the customary indicia of legitimate recordings.

the International Federation of Phonogram and Videogram Producers (IFPI) and other foreign national associations; and overseeing select copyright infringement and unfair competition litigation for member companies.

Thus, RIAA is intimately acquainted with the federal copyright law, various state laws, and state and federal criminal statutes, as they pertain to musical compositions and sound recordings.

RIAA's members, as sellers of legitimate sound recordings, are financially damaged by the sale of pirate, counterfeit and bootleg recordings.

RIAA's purpose in submitting this *amicus curiae* brief is to assist the Court in considering the legal status of unauthorized phonorecords infringing musical composition copyrights under the Federal Copyright Law, 17 U.S.C. Section 101, *et. seq.*, and under the federal criminal statute 18 U.S.C. Section 2314.

SUMMARY OF ARGUMENT

The Copyright Act and the National Stolen Property Act ("NSPA") serve separate and distinct functions. In promulgating one, Congress did not repeal the other. The existence of two penal statutes with differing objectives does not create a requirement that one be used to the exclusion of the other. When Petitioner's copyright infringing activities extended into interstate commerce, he violated the penal provisions of both Acts.

The history of NSPA demonstrates that it is intended to prevent the pollution of interstate commerce. Such pollution occurs when phonorecords embodying illegally reproduced and distributed copyrighted musical compositions enter the stream of commerce. Copyrights, as personal property, are recognized as goods. Such copyrighted musical compositions constitute goods, wares or merchandise within the meaning of 18 U.S.C. Section 2314.

Copyrighted musical compositions constitute personal property which can be transported and misappropriated. They are

capable of being stolen, converted or taken by fraud within the meaning of 18 U.S.C. Section 2314. The State of California, from which the stolen property in the instant matter was shipped interstate, recognizes that property equivalent to copyright can be the subject of a theft.

ARGUMENT

I

THE PENAL PROVISIONS OF 18 U.S.C. SECTION 2314 AUGMENT THE REMEDIES FOR COPYRIGHT INFRINGEMENT UNDER 17 U.S.C. SECTION 506(a) AND 18 U.S.C. SECTION 2319

A. *Legislative History Of The Statutes At Issue Establishes That The Copyright Act Is Not The Exclusive Remedy For Criminal Activity Involving Copyright Infringement.*

In 1976, Congress generally revised the Copyright Law of the United States, 17 U.S.C. Section 101, *et seq.* Sections 501 through 510 delineated what type of conduct constituted civil and criminal copyright infringement and the remedies then applicable.

Prompted by the burgeoning growth in the piracy and counterfeiting of copyrighted material which is now acknowledged to be one of the most prolific and troublesome areas of white collar crime, Congress, in 1982, enacted the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. 97-180, 96 Stat. 91 (eff. May 24, 1982) codified at 17 U.S.C. Section 506(a) and 18 U.S.C. Sections 2318, 2319. This amendment, *inter alia*, increased the criminal penalties for infringement of copyrighted sound recordings and audiovisual works.

Piracy, counterfeiting and bootlegging have to some extent afflicted the recording industry since its earliest days. However, particularly since the development of tape technology, record

piracy has grown to become a major criminal activity.² Congress addressed this problem by enacting the Piracy and Counterfeiting Amendments Act of 1982. *See*, S. Rep. No. 274, 97th Cong. 1st Sess. (1981) p4.

Although the most obvious victims of this crime are the record companies, there are many others who are robbed by these technological thieves. Unlike pirates, record companies pay royalties for each record or tape they sell. Therefore pirates rob the recording artist, the producer, the composer and publisher of the compositions, the musicians who helped make the record and union pension and trust funds of their fair share of the royalties due them from record sales. These people generally depend on those royalties for their livelihoods. Therefore the pirate, who makes none of these payments when selling his illegal copies, is stealing from these people as well. Additionally, the financial loss incurred as a result of piracy ultimately drives up the price of legitimate product. The financial loss to record companies deprives them of funds with which to subsidize less profitable (classical, jazz, etc.) types of music, new performers and composers. Thus, the average consumer is the ultimate victim of this crime, due both to the diminution of the variety of recorded music and the inferior quality of illicit product sold by pirates. Furthermore, as with most other illegal enterprises, a pirate pays no income or other taxes on the money he steals.

² With vast illicit profits at stake, an increasing number of people have been attracted to this crime. The potential profits are enormous. Unlike a record company, the pirate bears none of the initial costs of searching for talent, creating and producing a recording, which can run to several hundred thousand dollars per recording. In addition, unlike legitimate recording companies, pirates do not bear the continuing costs of publicizing and promoting their product and paying royalties. Beyond the cost of purchasing a single commercial copy for use as a master, the pirate incurs only a per unit manufacturing cost of under a dollar. If the pirate duplicates the original packaging as well as the recording and thus makes a counterfeit copy of the original recording, the retail price of these illegal recordings can sometimes run as high as the price of legitimate recordings.

The Piracy and Counterfeiting Amendments Act of 1982 is yet another part of the continuum of Congressional recognition that sound recordings *per se*, in addition to musical compositions, are entitled to copyright protection. See, Act of October 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (recognizing a copyright in sound recordings). Musical compositions have been the subject of copyright protection since the Statute of February 3, 1831, c. 16, 4 Stat. 436. See, *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1 (1908).

While copyrights in musical compositions and sound recordings are in some respects treated in a differing manner,³ the exclusive rights to reproduce the copyrighted work, 17 U.S.C. Section 106(1), and to distribute the copyrighted work, 17 U.S.C. Section 106(3) are, for the purposes of the instant case, identical for both musical compositions and sound recordings. Therefore, there is no distinction between copyrighted musical compositions and copyrighted sound recordings as to their inclusion within the meaning of "goods, wares [or] merchandise" capable of being "stolen, converted or taken by fraud" for purposes of 18 U.S.C. Section 2314.

In adopting the Piracy and Counterfeiting Amendments Act of 1982, the Senate Judiciary Committee noted:

This significant growth in the crimes of piracy and counterfeiting has been acknowledged by the Department of Justice. In a 1980 Report of the Attorney General entitled 'National Priorities for the Investigation and Prosecution of White Collar Crime,' the Justice Department listed copyright violations as the third most troublesome area of white collar crime. In testifying before this Committee regarding S. 691, a representative of the Department stated that:

³ See, e.g., 17 U.S.C. Sections 106(4) (public performance right for musical work but not for sound recording); 114 (scope of exclusive rights in sound recordings); and 115 (scope of exclusive rights in nondramatic musical works: compulsory license for making and distributing phonorecords).

Piracy and counterfeiting of copyrighted material, the theft of intellectual property, is now a major white collar crime. The dramatic growth of this problem has been encouraged by the huge profits to be made, while the relatively lenient penalties provided by the current law have done little to stem the tide.

This rapid growth in piracy and counterfeiting in the recording industry has occurred partly as a result of the tremendous progress in the technological tools for duplicating sound recordings and films.

S. Rep. No. 274, 97th Cong. 1st Sess. (1981) p. 4 (footnotes omitted).

Despite the increased severity of punishment that could now be meted out to copyright infringers, it is beyond peradventure that the Piracy and Counterfeiting Amendments Act of 1982 was not intended to be the exclusive remedy for illicit activity that has as its base copyright infringement. As Senate Report No. 274, *Id.*, at 2 makes manifest:

[T]he bill is intended to *supplement* existing remedies contained in the copyright law *or any other law* by adding the following language to subsection (a) of the new Section 2319:

... and such penalties shall be in addition to any other provision of title 17 *or any other law*

Id. at 2 U.S. Code Cong. & Ad. News (1982), p. 128 (emphasis added). The above language was added to 18 U.S.C. Section 2319 specifically to make clear that 18 U.S.C. Section 2319 was intended to supplement existing remedies. *Id.*⁴

⁴ Petitioner's reliance on *Sony Corp. v. Universal City Studios, Inc.*, ___ U.S. ___, 104 S. Ct. 774 (1982) to support the proposition that the Ninth

Both the legislative history and the unambiguous, explicit language of 18 U.S.C. Section 2319 demonstrate a Congressional resolve to enlarge the scope of remedies available to punish copyright infringers.

B. Coexistence Of Criminal Statutes Which Apply To A Single Pattern Of Criminal Conduct

The mere existence of two distinct criminal statutes under which a defendant may be prosecuted does not create a requirement that one be used to the exclusion of the other; *United States v. Gallant*, 570 F.Supp. 303 (S.D.N.Y. 1983), *United States v. Sam Goody, Inc.*, 506 F.Supp. 380 (E.D.N.Y. 1981). Overlapping statutes may be used jointly or separately. In *Blockburger v. United States*, 284 U.S. 299, 304 (1932), quoting *Morey v. Commonwealth*, 108 Mass. 433 (1871), this Court, when considering whether two statutes were mutually exclusive when applied to the same underlying act, stated:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not, *Gavieres v. United States*, 220 U.S. 338, 342 . . . A single act may be an offense against two statutes . . .

See also, *Periera v. United States*, 347 U.S. 1, 9 (1953). Furthermore, in *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) this Court reiterated the above test and explicitly stated

(Footnote continued)

Circuit impermissibly expanded the remedies for copyright infringement is misplaced. In *Sony* this Court merely stated that "[t]he remedies for infringement 'are only those prescribed by Congress.'" *Id.* at 796. Petitioner apparently has forgotten that Congress had determined that the remedies for copyright infringement are not exclusively contained in the Copyright Act and the Piracy and Counterfeiting Amendments Act of 1982, declaring that "any other law" may proscribe crimes involving infringement, if the requisite elements are proven.

that its "application . . . focuses on the statutory elements [of the offenses in question, and it can be satisfied if] each requires proof of a fact that the other does not, . . . notwithstanding a substantial overlap in the proof offered to establish the crimes" proscribed by the respective statutes.

In the instant matter, Dowling was convicted, *inter alia*, of nine counts of copyright infringement, in violation of 17 U.S.C. Section 506(a) and eight counts of interstate transportation of stolen property, in violation of 18 U.S.C. Section 2314. Applying the touchstone of *Blockburger, supra*, it is clear that there are two offenses involved, not one. Thus, Section 2314 requires proof that the infringing material unlawfully sold by Dowling was (1) transported in interstate commerce and (2) that its value was \$5,000 or more. These essential elements necessary to sustain a conviction under 18 U.S.C. Section 2314 are not requisite to prove copyright infringement under 17 U.S.C. Section 506(a).

Additionally, as the court noted in *United States v. Gallant*, 570 F.Supp. 303, 312, n.12 (S.D.N.Y. 1983),

[t]he additional element of interstate transportation is substantive. A copyright infringer who violates the criminal copyright laws in one state commits one violation. Someone who infringes a copyright and then sets up an interstate distribution system to market the materials that he has illicitly produced and furthermore, uses this distribution system beyond *de minimis* amount, is guilty of a different and most serious criminal offense.

Titles 17 U.S.C. Section 506(a) and 18 U.S.C. Section 2314 serve separate and distinct objectives as they apply to those engaged in the theft of intellectual properties. 17 U.S.C. Section 506(a) is designed specifically to protect copyright holders from willful infringement of their copyrights. The National Stolen Property Act, in the context of the instant case, seeks to prevent those who have stolen or fraudulently acquired intellectual property belonging to another in violation of the copyright

statute from furthering their criminal plans by making use of interstate commerce to transport such stolen or fraudulently acquired intellectual property. *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984); *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); *Lyda v. United States*, 279 F.2d 461, 463-65 (5th Cir. 1960).

"When there are two acts upon the same subject the rule is to give effect to both if possible . . . The intention of the legislature to repeal 'must be clear and manifest.'" *United States v. Borden*, 308 U.S. 188, 198 (1939), quoting *Red Rock v. Henry*, 106 U.S. 596, 601-2 (1883). Congress has given no indication that the criminal penalties in the Copyright Law and 18 U.S.C. Section 2314 are mutually exclusive when applied to conduct that contravenes both. No such inference may be implied.

Thus, there is no legal basis for Petitioner's contention that his conviction under both 18 U.S.C. Section 2319 and 18 U.S.C. Section 2314 must be set aside.

II

COPYRIGHTED MUSICAL COMPOSITIONS EMBODIED IN A PHONORECORD CONSTITUTE "GOODS, WARES [OR] MERCHANDISE" WITHIN THE MEANING OF 18 U.S.C. SECTION 2314

A. *The Legislative History And Language of 18 U.S.C. Section 2314 Demonstrate Congressional Intent To Enact A Comprehensive and Flexible Statute That Encompasses Both Tangible And Intangible Property*

The National Stolen Property Act, 18 U.S.C. Section 2314, provides, in pertinent part, that

Whoever transports in interstate or foreign commerce any goods, wares [or] merchandise . . . of the value of \$5,000 or more, knowing the same to have been

stolen, converted or taken by fraud . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

Petitioner Dowling argues that his interstate transportation of "bootleg" phonorecords does not violate Section 2314 because he has not "stolen or converted" any "goods" within the meaning of the statute. This contention raises two separate issues: (1) whether intangible property, in particular, the musical compositions embodied in a phonorecord taken in violation of the copyright laws, constitutes goods, wares or merchandise; and (2) whether the unauthorized duplication of copyrighted musical compositions constitutes a stealing, converting, or a taking by fraud.

The history of Section 2314 demonstrates that Congress intended to enact an encompassing, malleable statute to deter the transportation in interstate commerce of all manner of property unlawfully possessed with a value of \$5,000 or more. *United States v. Turley*, 352 U.S. 407, 414 n. 13 (1957). Former Attorney General Cummings in commenting on the scope of a bill which amended 18 U.S.C. Section 2314 stated that:

This legislation proposes to amend the National Stolen Property Act, which in general makes it a criminal offense knowingly to transport in interstate or foreign commerce *any stolen property* of the value of \$5,000 or over. (Emphasis added).

S. Rep. No. 674, 76th Cong. 2nd Sess. (1939)

While the phrase "goods, wares, [or] merchandise" is not defined in 18 U.S.C. Section 2314, its legislative history establishes that it is intended to extend broadly to all types of property likely to move in commerce. No distinction is made between items of a tangible or an intangible nature. Rather, the focal point of Section 2314 is the mobility of property intended to move through commerce for the purpose of producing commercial revenue. *United States v. Greenwald*, 479 F.2d

320 (6th Cir. 1973), *cert. denied* 414 U.S. 854 (1973), *American Cyanamid Co. v. Sharff*, 309 F.2d 790 (3rd Cir. 1962), *United States v. Sam Goody, Inc.*, 506 F. Supp. 380 (E.D.N.Y. 1981). "The terms 'goods, wares, merchandise' is a general and comprehensive designation of such *personal property* or chattels as are ordinarily a *subject of commerce*." (emphasis added), *United States v. Seagraves*, 265 F.2d 876, 880 (3rd Cir. 1959) (geophysical maps subject of commerce, albeit of a specialized nature); *American Cyanamid Co. v. Sharff*, 309 F.2d 790 (3rd Cir. 1962).

B. Since A Copyrighted Musical Composition Embodied In A Phonorecord Is Personal Property And A Subject Of Commerce, It Constitutes "Goods, Wares [or] Merchandise" Within The Meaning Of 18 U.S.C. Section 2314

The fact that a copyrighted musical composition embodied in a phonorecord is personal property and a subject of commerce constituting "goods, wares [or] merchandise" within the meaning of 18 U.S.C. Section 2314 is evidenced by the nature of a copyright and the bundle of rights granted to a copyright owner.

A musical composition is endowed with commercial value enabling it to be a subject of commerce; see 17 U.S.C. Section 106 defining the bundle of rights accorded copyright owners, including musical composition copyright owners. The proprietor of a copyrighted musical composition can transfer the ownership of such property "by any means of conveyance or by operation of law, and [such intellectual property] is to be treated as *personal property* upon the death of the owner. The term 'transfer of copyright ownership' [of such copyrighted personal property includes] any 'conveyance, alienation, or hypothecation,' including assignments [and] mortgages." (Emphasis added). H. Rep. No. 1476, p. 123, 94th Cong. 2nd Sess. (1976). See also, 17 U.S.C. Sections 101, 201.

Even the dictionary definitions of personal property and goods lead to the conclusion that a musical composition protected beneath the panoply of the copyright law constitutes "goods"

within the meaning and intent of Section 2314. "Goods" is "[a] term of variable content and meaning. It may include *every* species of *personal property*..." Black's Law Dictionary, 624 (Rev. 5th Ed. 1979) (emphasis added). "Personal property is [classified as being] divisible into (1) corporeal personal property, which includes movable and tangible things...and (2) incorporeal personal property which consists of such rights as ...stocks, shares,...and copyrights." *Id.* at 1096.

As the preceding makes clear, notwithstanding their intangible nature, a copyright constitutes both personal property and goods within the ordinary and general usage of these words in the law. Given the intent of Congress that 18 U.S.C. Section 2314 be enacted as a comprehensive and flexible statute, Petitioner Dowling's argument that the meaning of "goods" is not intended to apply to copyrighted material is unfounded.

C. Judicial Analysis Establishes That Intangible Personal Property, Particularly A Copyrighted Musical Composition, Is "Goods, Wares [or] Merchandise" Within The Meaning Of 18 U.S.C. Section 2314

Numerous federal courts that have had the occasion to scrutinize the matter have determined that intangible personal property, including a copyright, qualifies as "goods, wares [or] merchandise" within the meaning of 18 U.S.C. Section 2314. The only decision to the contrary is *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982), which will be considered below.

In *United States v. Seagraves*, 265 F.2d 876 (3rd Cir. 1959), the court affirmed a conviction of conspiracy to violate 18 U.S.C. Section 2314 where the goods, wares or merchandise transported in interstate commerce were "wrongfully supplied *copies* of a number of " geophysical and geological maps. *Id.* 265 F.2d at 878. (Emphasis added). The *Seagraves* court had no difficulty in holding that the copies of maps were goods, wares or merchandise, reasoning that "[s]ince the maps were shown without doubt to be subjects of commerce, albeit of a specialized nature, they are goods or wares or merchandise

within the terms of the Act." *Id.* at 880. In *American Cyanamid Co. v. Sharff*, 309 F.2d 790 (3d Cir. 1962), the court again utilized the "subject of commerce" test in determining that the articles stolen, which included confidential information, were personal property, and if found to be ordinarily a subject of commerce, the provisions of Section 2314 would apply.

The purpose of Section 2314 is to reach all property which has a minimal commercial value of at least \$5,000. The "subject of commerce" test is equally applicable to tangible and intangible property, provided that the property has value in the commercial market. This prompted the court in *United States v. Bottone*, 365 F.2d 389 (2nd Cir. 1966) *cert. denied* 385 U.S. 974 (1966) to conclude that the intangible information constituting trade secrets was "the purpose of the theft." In *United States v. Greenwald*, 479 F.2d 320 (6th Cir. 1973) *cert. denied* 414 U.S. 854 (1973), the court, presented with the issue of whether secret chemical formulae fell within the statutory language of "goods, wares [or] merchandise," determined there was a commercial market "for chemical manufacturers to exchange formulae and formulations either by outright sale or through licensing agreement[s]. Significantly, these formulae are treated as assets, in the same manner as machinery, equipment or accounts receivable." *Id.* at 321. Applying the *Seagraves* subject of commerce test, the court looked to the commercial realities of the property in question, rather than its intangible nature, and held that "...given an established, viable, albeit limited, market in chemical formulations . . . the normal, ordinary and logical import of the statuorty language dictates the conclusion that the documents (containing the chemical formulations) are 'goods, wares [or] merchandise' within the meaning of the Act." *Id.* at 322. While the formulae were contained on paper, the court discussed the commercial nature of the property, i.e., the formulae, rather than the tangible state in which it existed.

In the present case, there is no question that the embodiment of musical compositions performed by Elvis Presley in unauthorized "bootleg" phonorecords have substantial commercial value. The Petitioner built a million dollar interstate business

through the unauthorized use of copyrighted musical compositions in "bootleg" phonorecords. (Joint Appendix at 24-33).

A plain reading of Section 2314 has prompted numerous courts to hold that a copyright can constitute "goods, wares [or] merchandise" within the meaning of Section 2314. *United States v. Drum*, 733 F.2d 1503 (11th Cir. 1984) *cert. denied* Nos. 84-328, 84-51, 84-5219 and 84-53 (November 26, 1984); *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984); *United States v. Belmont*, 715 F.2d 450 (9th Cir. 1983) *cert. denied* No. 83-769 (February 21, 1984) and No. 83-1445 (May 29, 1984); *United States v. Berkowitz* 619 F.2d 649 (7th Cir. 1980); *United States v. Whetzel*, 589 F.2d 707 (D.C. Cir. 1978); *United States v. Drebin*, 557 F.2d 1316 (9th Cir. 1977) *cert denied* 436 U.S. 904 (1978); *United States v. Atherton*, 561 F.2d 747 (9th Cir. 1977) *United States v. Gallant* 570 F. Supp. 303 (S.D.N.Y. 1983); *United States v. Sam Goody, Inc.*, 506 F. Supp. 380 (E.D.N.Y. 1981). The only decision in conflict with the foregoing plethora of authority is *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982), and is readily distinguishable from the case at bar. (See discussion at II(D), *infra*.)

In *United States v. Sam Goody, Inc.*, 506 F. Supp. 380 (E.D.N.Y. 1981), the court concluded, that there is "no compelling reason why the 'subject of commerce' test cannot be applied here to bring counterfeit tapes properly within the ambit of 'goods, wares [or] merchandise' in Section 2314..." The Court's conclusion is based on the acknowledgement that it is the intangible intellectual properties embodied in individual phonorecords which are of substantial commercial value. *Id.* at 388. The *Sam Goody* court further stated, relying on *United States v. Bottone*, *supra*, "that when an item derives its value from intangible concepts or intellectual property -- whether copyrighted or not -- contained within it, no theft of the original tangible medium need occur at all; only the intangible component need be taken, ..." *Id.* at 389.

Furthermore, in *United States v. Drebin*, *supra*, the Ninth Circuit had no difficulty deciding that motion picture

photoplays which are intangibles, fall within the phrase "goods, wares [or] merchandise" in 18 U.S.C. Section 2314, and found the defendant's antithetical contentions "both illogical and contrary to law." The Eleventh Circuit in *United States v. Gottesman*, *supra*, declared that "the intangible idea protected by the copyright is effectively made tangible by its embodiment upon the tapes and therefore constitutes 'goods, wares [or] merchandise' within the meaning of section 2314." *Id.* 724 F.2d at 1520. The Eleventh Circuit in *United States v. Drum*, *supra*, reasoned that this definition is applicable irrespective of whether a defendant obtains the tangible embodiment of a copyrighted work legitimately or illegitimately. *See also*, *United States v. Atherton*, *supra*.

The *Gottesman* court accepted the argument that the property in issue was not the video cassettes, but rather the intangible magnetic signals impressed upon the tapes, and these intangibles constituted "goods, wares [or] merchandise" within the meaning of 18 U.S.C. Section 2314. In *United States v. Belmont*, *supra*, the Ninth Circuit explained the reasoning behind its holding that the phrase "goods, wares [or] merchandise" encompasses the intangible property of a copyright owner:

The rights of copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property. When society creates new kinds of property and thieves devise new ways of appropriating that property to their own use, the law against transporting property expands with the growth in the varieties of property. There is no utility in ... sterile formality...

Id. 715 F.2d at 461-462

The recognition by courts of the numerous forms of property which exist in our technological era has resulted in decisions like *United States v. Berkowitz*, *supra*, where the court recognized that what was stolen was the "fixation of recorded sounds, not

the tangible component parts of the tapes." 619 F.2d at 658. As the court readily acknowledged in *United States v. Bottone*, *supra*, 365 F.2d at 393, "When the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers [or in this case the musical compositions] into a tangible object never possessed by the original owner should be deemed immaterial..." Clearly, *Bottone* and its progeny demonstrate that intangible property, such as musical compositions subject to copyright protection are "goods, wares [or] merchandise" capable of being stolen and transported unlawfully in interstate commerce thereby necessitating the unique protection provided by 18 U.S.C. Section 2314.

The commercial value of musical compositions, although intangible in nature, is established by their embodiment in phonorecords which can result in substantial revenue being reaped by the composition copyright owners. Musical composition copyrights constitute property deserving of and requiring the protection against unlawful misappropriation afforded by 18 U.S.C. Section 2314.

D. The Fallacies Of *United States v. Smith*

The only decision which appears to conflict with the conclusion that copyrighted works of authorship, such as in this case, musical compositions, constitute "goods, wares [or] merchandise" which can be "stolen, converted or taken by fraud" within the meaning of 18 U.S.C. Section 2314 is *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982). The *Smith* court relied in large part on rigid and archaic definitions to justify its finding that a copyrighted work is not a "good, ware [or] merchandise." *Id.* at 239 n.5.

First, the Fifth Circuit in *Smith* defined a "copyright" as "nothing more than an incorporeal, intangible right or privilege to engage in or to authorize certain activity." *Id.* This definition is limited. The Copyright Law demonstrates the true meaning, import and essence of copyright in our modern technological

era. In addition to the *Smith* definition of copyright, above, the Copyright Law gives owners the right to exclusive usage, sale, and licensing, as well as rights concerning public performance and derivative works. 17 U.S.C. Section 106. As explained above, a copyright denotes personal property of substantial value, notwithstanding its intangible nature, and affords the owner such significant commercial rights as reproduction and distribution of the copyrighted work, 17 U.S.C. Section 106, as well as providing the owner the opportunity to mortgage, assign, lease, pledge or hypothecate the copyright in any fashion provided under substantive law, 17 U.S.C. Sections 101, 201.

Second, the *Smith* court misapprehends 17 U.S.C. Section 202, the provision which delineates the ownership rights of a copyright holder. The Fifth Circuit misconstrues the divisibility of a copyright by erroneously concluding that "ownership of a copyright does not encompass ownership of the words, sounds, pictures, or images embodied in the *tangible object*." *Id.* at 240 (emphasis added). The purpose of 17 U.S.C. Section 202 is to clarify that a copyright is intangible property, such as an aggregation of sounds, and even if those sounds are embodied in a tangible object, e.g., tape or disc, the owners of those sounds do not lose any rights to those sounds. Section 202 was specifically designed to give a purchaser of a tangible object which contains copyrighted material only the right to use or dispose of that one specific tangible object. The copyright owner forfeits none of his exclusive rights under the Copyright Law or any other substantive law by disposing of a tangible object which embodies a copyrighted work.

Third, while the dictionary definition of "goods" does not specifically include incorporeal or intangible rights or privileges, it speaks in terms of personal property, which has previously been conclusively proven to include everything corporeal or incorporeal, tangible or intangible. The misplaced reliance of the *Smith* court in its definition of "goods" ignores the important role which copyrights play in the business community.

A recent report of the U.S. Copyright Office, *Report of the United States Copyright Office to the Subcommittee on Patents,*

Copyrights and Trademarks, Committee on the Judiciary, United States Senate, on the Size of the Copyright Industries in the United States (December, 1984),⁵ reveals that in 1977 (the last year for which Economic Census data are in final form), "Copyright industries contributed some \$55 billion to the United States economy, which amounts to approximately 2.8% of the Gross National Product." *Id.* at "Executive Summary", 8 and 10.

The *Smith* court although acknowledging that 18 U.S.C. Section 2314 should be interpreted broadly, clings to its parochial view which defines a "good" as nothing more than a tangible object. The reasoning of the Fifth Circuit is strained, since it applies archaic notions of property, misconstrues clear statutory language and does not deal with commercial realities.

III

A COPYRIGHTED MUSICAL COMPOSITION EMBODIED IN A PHONORECORD IS CAPABLE OF BEING "STOLEN, CONVERTED OR TAKEN BY FRAUD" WITHIN THE MEANING OF 18 U.S.C. SECTION 2314

As the court in *United States v. Bottone*, *supra*, specifically held, illicit copying of a copyrighted work is no less a "theft, conversion or taking by fraud" than if the original were so taken. "[T]he physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial..." *Id.* at 393-94. See also, *United States v. Drebin*, 557 F.2d 1316 (9th Cir. 1977). Further, as has been noted by Chief Justice (then Judge) Burger, in an action based on the infringement of copyrighted musical compositions, record piracy "might better be described by other terms connoting larceny." *Shapiro Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263, 269 (2nd Cir. 1959).

⁵ Copies of this unpublished report of the U.S. Copyright Office are lodged with the Clerk of this Court.

This Court has instructed lower courts to free their minds from the notion that criminal statutes must be construed by "artificial and conventional" rules. *United States v. Dege*, 364 U.S. 51, 52 (1960) (Frankfurter, J.), quoting *United States v. Union Supply Co.*, 215 U.S. 50, 55 (1909) (Holmes, J.).

It is significant to note that under California⁶ state law, the Petitioner's acts would be classified as a "theft". In *People v. Szarvas*, 191 Cal. Rptr. 117 (Cal. App. 2nd Dist. 1983), the defendant, based on his duplication for a fee of certain record albums, was convicted of both Penal Code Section 653h (a)(1) and petty theft. *Id.* at 119.

California Penal Code Section 653h (a)(1) prohibits the willful transfer of sounds that have been recorded on phonograph records or other articles. *Id.* This section provides protection for sound recordings fixed prior to February 15, 1972⁷ and is equivalent to prohibitions against copyright infringement contained in the Copyright Law, 17 U.S.C. Sections 106(1) and (3), 501, 506(a).

The *Szarvas* court had no difficulty in holding that the defendant's conviction under both the "copyright-like" statute and the theft statute was proper.⁸

⁶ In the instant case, petitioner was convicted of shipping stolen property from California to Maryland and Florida. Joint Appendix at A7-8 and A47-A48.

⁷ February 15, 1972 is the effective date of the Act of October 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) which recognized a copyright in sound recordings. Sound recordings fixed on or after that date are subject to the provisions of the Copyright Law, 17 U.S.C. Section 102(a)(7) and equivalent state laws are preempted, 17 U.S.C. Section 301.

⁸ Under California Law, a defendant cannot, after conviction, be punished twice where an act or omission is made punishable in different ways by the Penal Code. *People v. Szarvas*, *supra*, 117 Cal. App. at 122-123. The penal provision in question, California Penal Code Section 654, does not prohibit double convictions. *Id.* at 123. The *Szarvas* court noted that the defendant could properly be convicted for both the unauthorized duplication of sounds count and the theft count, but could only be punished for the more serious offense. *Id.*

A review of the legislative history and the statutory language of Section 2314, with a view toward the common usage of the terms "steal," "conversion" and "taking by fraud" will assist in evaluating whether the statute is applicable in the present case.

The National Stolen Property Act was and is designed to thwart the misuse of interstate commerce. As the court noted in *Lyda v. United States*, 279 F.2d 461, 464 (5th Cir. 1960):

The aim of [the National Stolen Property Act] is, of course, to prohibit the use of interstate transportation facilities for goods having certain *unlawful qualities*. This reflects a congressional purpose to reach *all ways* by which an owner is wrongfully deprived of the *use or benefits* of the use of his property. (Emphasis added).

Further, as noted in *United States v. Frakes*, 563 F.2d 803 (6th Cir. 1977) *vacated on other grounds* 435 U.S. 911 (1978) quoting *Morrisette v. United States*, 342 U.S. 246, 271 (1952):

What has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches.

The *Frakes* court determined that Congress used broad terms to make clear that if a person was deprived of his property by unlawful means such as fraud, a taking without his permission or by a conversion by one rightfully in possession, the subsequent transportation of such goods in interstate commerce was prohibited as a crime. *United States v. Frakes*, *supra*, 563 F.2d at 806.

This court has defined the term "stolen" as all felonious takings with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny. *United States v. Turley*, 352 U.S. 407

(1957). The issue of whether the "goods" were obtained by unlawful methods of acquisition is not to be decided on the basis of technical common law definitions. *Bergman v. United States*, 253 F.2d 933, 935 (6th Cir. 1958).

Conversion has been interpreted as the act of appropriating dishonestly or illegally to one's own use anything of value. *United States v. Evans*, 579 F.2d 360, 361 (5th Cir. 1978); *United States v. McClain*, 545 F.2d 988, 995 (5th Cir. 1977). Fraud is defined as an intentional misrepresentation, concealment, or nondisclosure for the purpose of inducing another, in reliance upon it, to part with something of value or surrender a legal right. *United States v. Evans, supra*, 579 F.2d at 361.

This Court in *Morrisette v. United States*, 342 U.S. 246 (1951) delineated what constitutes a conversion.

Conversion...may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for a limited use.

Id. at 271-72.

The terms "stolen, converted or taken by fraud" were extended broadly to cover all forms of wrongful taking, *United States v. Sam Goody, Inc.*, 506 F. Supp. 380 (E.D.N.Y. 1981); *United States v. Plott*, 345 F. Supp. 1229 (S.D.N.Y. 1972).

In *United States v. Handler*, 142 F.2d 351, 353 (2d Cir. 1944), the court commented on the intended breadth of the terms in Section 2314:

In our opinion the statute is applicable to any taking whereby a person dishonestly obtains goods...belonging to another with the intent to deprive the owner of the rights and benefits of ownership.

Applying the above principles to the case at bar, it is demonstrated that an unauthorized reproduction of musical compositions subject to copyright protection is a clear example of stealing, converting, or taking by fraud. The rights of copyright owners in their property are just as deserving of protection as those of the owner of other types of property, *United States v. Drum, supra*; see also, *United States v. Belmont, supra*.

There is also no question that the "goods, wares [or] merchandise" do not have to be transported in exactly the same form as they were when "stolen, converted or taken by fraud." Nearly every court considering an indictment under Section 2314 has read the words "the same" not to require literally that what is transported be in exactly the same form as what was stolen. *United States v. Bottone, supra*; *United States v. Lester*, 282 F.2d 750, 755 (3d Cir. 1960) *cert. denied*, 364 U.S. 937 (1961); *United States v. Atherton, supra*, 561 F.2d at 752.

Thus, the court in *United States v. Sam Goody, Inc., supra*, had no problem finding that criminal copyright infringement by unauthorized reproduction or unauthorized distribution of copyrighted sound recordings supported a conviction under Section 2314. The court reasoned that the illegal conduct resembled a

traditional conversion, in that it involves the unauthorized appropriation of property belonging to another party after the property had been lawfully given to the infringer for a limited use, and the requisite intent on the part of the infringer to put the property to his own use and for his own benefit.

Id. 506 F. Supp. at 391.

The *Sam Goody* court further added that such conduct also qualifies as stealing or taking by fraud under the statute. *Id.*

Additionally, the Ninth Circuit in *United States v. Belmont, supra*, found that defendants could be convicted under Section 2314 for interstate sales of unlicensed videotaped cassettes of

motion pictures. The court determined that the genesis of the copyrighted work, whether it be acquired lawfully or illegally was not conclusive; rather the unauthorized duplication of copyrighted works was sufficient to constitute stealing, conversion or a taking by fraud. Addressing this issue, the court in *United States v. Drum, supra*, declared that the defendants' unauthorized appropriations were irrelevant to the charges against them, "[L]egitimate acquisition of copyrighted material does not ameliorate the effect of subsequent illegal duplication and distribution of that material." *Id.* 733 F.2d at 1506. Also, in *United States v. Drebin, supra*, the court reiterated that illicit copying of a copyrighted work is no less a "theft, conversion or taking by fraud" than if the original were also taken.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated: New York, New York
March 29, 1985.

Respectfully submitted,

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ALEXANDER L. STEVAS

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In the Supreme Court of the United States

OCTOBER TERM, 1984

PAUL EDMOND DOWLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's shipment of "bootleg" record albums containing unauthorized reproductions of performances of copyrighted musical compositions could form the basis for charges of interstate transportation of stolen property, in violation of 18 U.S.C. 2314.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-589

PAUL EDMOND DOWLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. Supp. App. A1-A12) is reported at 739 F.2d 1445.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1984. The petition for a writ of certiorari was filed on October 9, 1984, and was granted on January 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The National Stolen Property Act, 18 U.S.C. 2314, provides in pertinent part:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud * * *

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

(1)

STATEMENT

Following a bench trial in the United States District Court for the Central District of California, petitioner was convicted on one count of conspiracy to transport stolen property in interstate commerce and to distribute phonorecords without the consent of copyright proprietors, in violation of 18 U.S.C. 371 (Count One); eight counts of interstate transportation of stolen property, in violation of 18 U.S.C. 2314 (Counts Two through Nine); nine counts of copyright infringement, in violation of 17 U.S.C. 506(a) (Counts Ten through 18); and three counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 25 through 27) (Pet. Supp. App. A3, A4 n.6, A13; J.A. A2-A13, A47).¹ Petitioner was sentenced to a one-year term of imprisonment on one of the copyright infringement counts (Count Ten) and to a six-month term of imprisonment on the mail fraud counts, to run consecutively to the sentence on Count Ten. The remaining sentences were suspended in favor of a term of five years' probation following the terms of imprisonment, on the condition that petitioner perform 1,500 hours of community service. Petitioner also was fined \$5,000 in connection with Counts Two through Nine. Pet. Supp. App. A4; J.A. A48-A49.²

¹ Petitioner's case was severed from that of his co-defendants (Pet. Supp. App. A4). Co-defendant William Samuel Theaker pleaded guilty to six counts of the indictment, and co-defendant Richard Minor was convicted on all charges against him following a separate trial. Minor's appeal is now pending before the United States Court of Appeals for the Ninth Circuit.

² There appears to be no doubt that Judge Lydick found petitioner guilty on counts of the second superseding indictment (reproduced at J.A. A2-A13) and that the sentencing portion of Judge Real's Judgment and Commitment Order refers to those counts. See Pet. Supp. App. A3-A4, A13; J.A. A47-A49; Pet. Br. 5. However, the portion of the Judgment and Commitment Order that sets forth the finding and judgment (J.A. A48) refers to the first superseding indictment and describes the counts in a manner that does not correspond completely to any of the three indictments. That discrepancy presumably results from a clerical error.

1. The evidence showed that petitioner and his co-defendants successfully conspired to manufacture, transport, and distribute copies of recordings of Elvis Presley vocal performances.³ Beginning around 1976, petitioner and co-defendant William Samuel Theaker began manufacturing and distributing "bootleg" Elvis Presley phonorecords, i.e., phonorecords made from unreleased Presley recordings, without the consent of RCA Records or the copyright proprietors of the songs performed (Pet. Supp. App. A2).⁴ Co-defendant Richard Minor assisted in

³ The case was tried largely on a stipulated record, including testimony of 30 witnesses and 950 government exhibits. Petitioner testified orally on his own behalf and cross-examined two of the government's witnesses, Aca Anderson and Joan Deary.

"Stiptest." and "Stip." refer to those portions of the stipulated testimony and stipulations of fact submitted to the trial court that are not included in the Joint Appendix. They can be found in the Excerpt of Record filed in the court of appeals. "Tr." refers to the transcript of the Anderson and Deary cross-examination and of petitioner's testimony.

⁴ During his professional career, Elvis Presley was under contract to RCA Records and, briefly, to Sun Record Company. Under a 1955 contract between RCA and Presley (extended in 1956 and 1973), RCA acquired the exclusive right to manufacture and distribute sound recordings containing Elvis Presley vocal performances made after November 15, 1955; RCA also acquired the rights under Presley's earlier contract with Sun. RCA's exclusive right remained in effect at the time of the trial in this case. J.A. A36-A37.

Record manufacturers are required by the Copyright Act, 17 U.S.C. 1 *et seq.*, to obtain mechanical licenses and to pay royalties to songwriters and publishing companies when they press records that contain performances of copyrighted musical compositions. 17 U.S.C. 115; J.A. A37. The copyrights for certain songs performed by Elvis Presley are held by various publishing companies, including Elvis Presley Music, Inc., and Gladys Music, Inc. (Stip. re Copyrights, Royalties and Licenses 111-125). The soundtracks of Elvis Presley's movies are protected by motion picture copyrights (J.A. A38-A39). However, most of the recordings of Presley performances (as opposed to the musical compositions performed) were not copyrighted, because the federal copyright statute did not extend protection to sound recordings prior to 1972. Advances in technology and development of the widespread ownership of tape-

manufacture and distribution of the bootleg albums, and Aca "Ace" Anderson assisted petitioner in distributing the albums (J.A. A14-A21).

Petitioner and Theaker manufactured 22 of their own bootleg albums, using material from studio outtakes, soundtracks of Presley motion pictures, tapes of Presley television and concert appearances, and acetates (J.A. A22-A23; Deary Stiptest. 24-47; Anderson Stiptest. 16-18).⁵ Each of the 22 bootleg albums included copyrighted

recording equipment increased the need for copyright protection of sound recordings. In the Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 *et seq.*, Congress provided for copyright protection of sound recordings fixed after February 15, 1972. See *Goldstein v. California*, 412 U.S. 546, 551-552 (1973).

The terms "bootleg" and "pirated" are sometimes used interchangeably to refer to unauthorized copying of sound recordings. Within the sound recording industry, however, the two terms have more specific meanings. A pirated recording is an unauthorized copy of a sound recording (whether copyrighted or not) that has been commercially released to the public. A bootleg recording is an unauthorized copy of a performance that has not been commercially released; the latter category includes copies of audience members' recordings of live performances, as well as "outtakes" and other unreleased materials held by recording studios (see note 5, *infra*; Tr. 88). Whether a recording is "bootleg" or "pirated," it may include performances of copyrighted musical compositions. The term "counterfeit" refers to a bootleg or pirated recording accompanied by labels, packaging, and art work that have been duplicated without authorization or that otherwise have been produced in a way that makes them appear genuine. See 18 U.S.C. 2318(b)(1); *United States v. Gallant*, 570 F. Supp. 303, 305 n.2 (S.D.N.Y. 1983).

⁵ "Outtakes" are portions of tapes not used in a final edited broadcast tape or tapes of performances that are not selected for inclusion in the master tape used to produce a phonorecord authorized for release (Pet. Supp. App. A2 n.1; Tr. 59-61). An "acetate" or "reference lacquer" looks like a phonorecord, but is cut with a stylus, rather than stamped. An acetate can be played like a record, but it wears down after only a few playings. Acetates were used by musicians and record producers before tape recorders were commonly available; they are still used to judge

musical compositions for which neither petitioner nor Theaker, nor any of the entities through which they operated, paid any royalties (Stip. re Copyrights, Royalties and Licenses 111-125; Stip. re Songs on Albums 127-145).

The source material petitioner and Theaker used to produce their bootleg albums was acquired by various illicit methods. For example, petitioner told Anderson that Theaker had paid an employee of Radio Recorders \$500 per tape for enough Presley tapes to make several long playing records and boxed sets (Anderson Stiptest. 15, 18; Tr. 79, 81).⁶ Petitioner and Theaker also obtained materials stolen from RCA archives. Among materials Anderson retained, despite petitioner's instruction to destroy them, was a box containing the master tape used to produce the bootleg album "The Legend Lives On," on which petitioner had written "RCA Stolen Tapes." Anderson Stiptest. 10, 11; Deary Stiptest, 37-39; Tr. 111-112.⁷ Theaker paid an NBC employee \$20,000 for access to NBC's tapes of Presley television programs (J.A. A42-A43; Anderson Stiptest. 18-19; Tr. 84-85, 134, 137-138).

how a performance is likely to sound on a phonorecord. J.A. A44; Tr. 67.

Petitioner and Theaker also manufactured and distributed so-called "junk LP's." These were approximately 50 bootleg records that originally had been distributed by other individuals and that petitioner and Theaker copied and advertised in their own catalogs (J.A. A20-A21).

⁶ Presley recorded the soundtracks for most of his motion pictures at Radio Recorders, a Hollywood recording studio. Neither Radio Recorders nor any of its employees was authorized to release master recordings or the outtakes that were produced during Presley's recording sessions, except to the motion picture studios that were its clients. Radio Recorders was authorized to release to RCA tapes of songs Presley sang for the MGM movie "Viva Las Vegas;" otherwise, all tapes were to be delivered to the clients without copying. J.A. A22, A34, A39, A46; Tr. 63-64.

⁷ The original sources for the stolen tapes were an eight-track RCA master tape recorded in Las Vegas and RCA 16-track tapes. No one at RCA was authorized to release the tapes. J.A. A23.

Petitioner acquired some source material by concealing or misrepresenting the purpose for which he planned to use it. For example, petitioner borrowed from John Herman, a Presley fan, a tape Herman had made of a 1976 New Year's Eve performance given by Elvis Presley in Pittsburgh and pictures Herman had taken at the concert. Although Herman informed Theaker that he did not want the materials copied, petitioner and Theaker used the tape and some of the photographs to make early pressings of the bootleg album "Rockin' With Elvis, New Year's Eve" and an album cover. Herman testified that he would not have loaned petitioner the materials had he known that petitioner and Theaker intended to use them to make an album. J.A. A16, A34-A36.⁸

Most of the bootleg albums were manufactured on the West Coast.⁹ Beginning in early 1979, Theaker and petitioner arranged to have many of these albums shipped by truck from California to Maryland, where petitioner resided, because they believed that the FBI was investigating Theaker's West Coast operation. J.A. A17. Each

⁸ In addition, in 1979 petitioner purchased an acetate of the copyrighted song "Plantation Rock" from one of its authors, Harvey Zimmerman. Petitioner told Zimmerman that he intended to play the acetate once and then mount it on his wall with special lighting; however, petitioner previously had told Anderson that if he were able to purchase the acetate from Zimmerman, he would use it to manufacture a record. Theaker eventually used the acetate in making the bootleg album "Plantation Rock." J.A. A43-A45; Anderson Stiptest. 14. Zimmerman testified that he would not have sold petitioner the "Plantation Rock" acetate if he had known it would be used to make a record (J.A. A45). While the "Plantation Rock" album was not included in the shipments that are the subject of the interstate transportation of stolen property charges in this case, petitioner's conduct is illustrative of the manner in which he and Theaker obtained some source materials.

⁹ From early 1976 until early 1980, a Burbank, California record pressing company manufactured bootleg Presley albums for petitioner and Theaker (Waddell Stiptest. 96-97, 100). In early 1980, when the Burbank firm refused to press more records for them, petitioner and Theaker arranged to have co-defendant Minor manufacture some of the bootleg albums in Florida (J.A. A20-A21).

shipment included thousands of albums (*id.* at A24-A33, A39-A42). Eight of the shipments formed the basis for the eight counts of interstate transportation of stolen property at issue in this case. Based on the list prices for which they eventually sold, the albums transported in the eight shipments had a value of approximately \$661,000. See J.A. A25-A33; Tr. 16-17.

During 1979 and 1980, at petitioner's and Theaker's direction, Send Service, a labeling and mailing service, mailed catalogs listing the bootleg albums to customers throughout the United States. Theaker collected the customers' orders through post office boxes in Glendale, California, and Los Angeles. He then sent the orders to petitioner, who mailed the bootleg albums from Maryland. Pet. Supp. App. A2.

The mail order business petitioner and Theaker operated was massive in scope. In the six to eight weeks following Elvis Presley's death in August 1977, the business received and filled between 250 and 300 orders per day. Petitioner told Anderson that the proceeds of these sales alone would allow petitioner and Theaker to live comfortably for the rest of their lives. J.A. A16. During 1979, Send Service mailed over 50,000 catalogs advertising the bootleg albums (Pet. Supp. App. A2). Each week during 1979-1980, petitioner mailed hundreds of packages, ranging from one-record mailings to packages weighing 20 to 30 pounds each; his postal bills were at least \$1,000 per week. *Ibid.* During this period petitioner was aware that Elvis Presley had been under exclusive contract with RCA, that the material petitioner and his co-defendants were reproducing included copyrighted compositions, and that manufacture and distribution of the bootleg albums were illegal (J.A. A16-A17, A19-A20, A38; Anderson Stiptest. 11, 13, 15; Deary Stiptest. 31, 33-35, 37, 41-47).

2. The court of appeals affirmed petitioner's convictions (Pet. Supp. App. A1-A12). Relying on its decision in *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), cert. denied, No. 83-769 (Feb. 21, 1984) and No.

83-1445 (May 29, 1984), the court rejected petitioner's claim that the government was limited to prosecuting him under the Copyright Act, 17 U.S.C. 506(a), and was therefore barred from prosecuting him for mail fraud and for interstate transportation of stolen property in connection with his bootleg record operation (Pet. Supp. App. A5-A6, A10-A11). The court concluded that the Piracy and Counterfeiting Amendments Act of 1982, 18 U.S.C. 2319, which explicitly provides that its penalties are in addition to those of Title 17 "or any other law," indicated that Congress did not intend the Copyright Act to constitute the exclusive penalty for persons who infringe copyrights (Pet. Supp. App. A6).¹⁰

SUMMARY OF ARGUMENT

A. The language of 18 U.S.C. 2314 encompasses petitioner's shipment of "bootleg" record albums containing unauthorized reproductions of performances of copyrighted musical compositions. Section 2314 imposes penalties on anyone who "transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud." Petitioner transported "goods, wares, [or] merchandise" worth more than \$5,000, *i.e.*, the bootleg albums. Those albums were "stolen, converted or taken by fraud" in two respects. The recordings containing the sounds that

¹⁰ The court of appeals further held that, for purposes of the mail fraud statute, 18 U.S.C. 1341, a scheme to defraud may be premised on nondisclosure in violation of an independent explicit statutory duty (Pet. Supp. App. A6-A9). Since petitioner conceded that the Copyright Act, 17 U.S.C. 115, created a statutory duty to report to RCA his intent to manufacture and distribute Elvis Presley recordings, the court concluded that petitioner's failure to contact RCA could form the basis for a scheme to defraud under Section 1341 (Pet. Supp. App. A8). The court of appeals also rejected petitioner's contentions that mailings of the catalogs advertising the bootleg albums were not in furtherance of the mail fraud scheme (*id.* at A9-A10) and that the testimony of an RCA employee should not have been admitted under the co-conspirator exception to the hearsay rule (*id.* at A10-A11).

were transferred onto the bootleg albums were stolen from their custodians; in addition, petitioner and his co-defendants directed the transfer of sounds onto the albums without authorization from those who had copyright and other forms of property interests in the recordings. Petitioner should not be permitted to escape Section 2314 penalties simply because the sounds were transferred from one physical object (a stolen tape) to others (bootleg phonorecords) before shipment in interstate commerce.

Petitioner's contention that a copyright does not constitute "goods, wares, [or] merchandise" is beside the point; no one is alleging that petitioner transported a copyright across state lines. And any claim that the transported albums were not covered by Section 2314 because their value derived primarily from intangible sounds is without merit. There is no indication that Congress intended the words "goods, wares, [and] merchandise" to exclude property with an intangible component; rather, the focus of the statutory terms is on the commercial character of an item. Property that has a significant intangible component, like the bootleg record albums in this case—or, for that matter, a Rembrandt painting—clearly can constitute a subject of commerce.

Petitioner's claim that the transported bootleg albums were not "stolen, converted or taken by fraud" also is without merit. In this case the evidence showed that there were thefts or fraudulent takings of the tapes that were duplicated in order to produce the albums. Whatever the Court might conclude with respect to our argument that the property interest reflected in a copyright is stolen or converted by the manufacture of unauthorized copies, Section 2314 is surely violated when, as here, the copied materials are themselves obtained by theft.

But even if there had been no initial theft of tangible items, the unauthorized duplication of sounds would be grounds for characterizing the bootleg albums as "stolen,

converted or taken by fraud." In using those broad terms, Congress referred comprehensively to many sorts of misappropriation of property. Since copyright proprietors and others who have invested resources in a recording of a musical performance have property interests in connection with that recording, unauthorized copying constitutes misappropriation and renders the duplicates "stolen, converted or taken by fraud" within the meaning of Section 2314.

B. Interpretation of Section 2314 to cover interstate shipments of bootleg record albums is consistent with legislative intent. The history of both the National Motor Vehicle Theft Act, now 18 U.S.C. 2312, and the National Stolen Property Act, now Section 2314, shows that Congress was concerned with halting the activities of gangsters who were engaged in extensive interstate movements of stolen property in order to escape the jurisdiction of state authorities. In view of the major role played by organized crime in the interstate transportation of unauthorized copies of sound recordings, and the significant effect of such activities on the entertainment industry, it is most unlikely that a Congress addressing those concerns would have chosen to exclude such operations from the scope of Section 2314.

Recent amendments to the federal copyright statute do not suggest that Congress viewed transportation of copyright infringing duplicates as outside the scope of Section 2314. Congress's addition of felony penalties for copyright infringement in 1982 in no way indicates a belief that those who engaged in unauthorized reproduction or distribution of infringing materials could not be prosecuted for the separate offense of interstate transportation of stolen property. In fact, after having been advised that prosecutors were charging record and tape pirates with violations of Section 2314, Congress provided explicitly that the penalties for copyright infringement set by the 1982 amendments were to be in addition to those under "any other law."

C. The fact that petitioner's bootlegging operation encompassed significant copyright infringing activities does

not immunize him from prosecution under Section 2314 for his interstate shipment of the bootleg albums. The criminal copyright provisions and Section 2314 are aimed at very different types of conduct. Here the copyright infringement counts against petitioner were based on sales of several bootleg albums to two individual customers in California, while the Section 2314 counts were based on petitioner's truck shipments of thousands of the albums from the West Coast to the East Coast prior to distribution to individual customers. Congress surely did not intend that an individual who participates in the interstate shipment stage of a bootlegging operation should escape Section 2314 penalties simply because copyright infringing activities may have occurred at a different stage of the operation.

ARGUMENT

PETITIONER WAS PROPERLY CHARGED WITH INTERSTATE TRANSPORTATION OF STOLEN PROPERTY, IN VIOLATION OF 18 U.S.C. 2314, BASED ON HIS SHIPMENT OF "BOOTLEG" RECORD ALBUMS CONTAINING UNAUTHORIZED REPRODUCTIONS OF PERFORMANCES OF COPYRIGHTED MUSICAL COMPOSITIONS

The question presented by this case is whether petitioner's shipment of "bootleg" record albums containing unauthorized reproductions of performances of copyrighted musical compositions could form the basis for charges of interstate transportation of stolen property, in violation of 18 U.S.C. 2314.¹¹ The charges against petitioner stemmed from his participation in an extensive commercial operation involving a series of steps. First, petitioner and his co-defendants obtained, by means of theft or fraud, unreleased ~~records~~ of Elvis Presley performances, including performances of various copyrighted musical compositions. Next, working primarily on the West Coast, they arranged for duplication of those illicitly acquired materials and production of a series of bootleg

¹¹ The Court's grant of certiorari was limited to the first question presented by the petition.

record albums. Petitioner then arranged for shipment of the bootleg albums by truck from California to Maryland, where petitioner resided, or, in several instances, to Florida, where co-defendant Minor worked. Petitioner and his co-defendants advertised the albums nationwide. Petitioner filled customer orders, mailing hundreds of albums from Maryland each week. See pages 3-7, *supra*.

Like other commercial operations involving bootleg or pirated copies of sound recordings or motion pictures, petitioner's operation yielded considerable commercial gain to those who directed it, and at the same time involved significant commercial losses by others.¹² Petitioner and his co-defendants paid no royalties to the pub-

¹² The Senate Judiciary Committee in 1981 described the financial gains, and the corresponding losses, involved in large-scale production of unauthorized copies of sound recordings and audiovisual works:

Piracy and counterfeiting of audio and audiovisual products have grown rapidly in recent years, developing into a highly sophisticated, billion-dollar-a-year business. * * * [A] counterfeiting ring discovered in 1977, was producing and disseminating more than 25 million counterfeit records a year, at an annual profit of more than \$30 million.

* * * * *

The financial loss to the film and recording industries is significant. An estimated \$600 million a year is diverted from the recording industry. The impact on the film industry is probably of similar magnitude. Piracy and counterfeiting of films and recordings affect almost every aspect of those industries. Recording artists, actors, and actresses lose significant amounts in royalties and fees from such activities. Musicians are denied certain income they receive based on the number of records sold. The earnings of composers and publishers are adversely affected by illicit sales of records and tapes. Moreover, piracy and counterfeiting activities drain income needed by the film and recording industries to assume the risk involved in investing in new films and recordings and in developing new talent.

S. Rep. 97-274, 97th Cong., 1st Sess. 3-5 (1981) (footnotes omitted). See also *Goldstein v. California*, 412 U.S. 546, 549-550 & n.5 (1973); *Tape Industries Ass'n of America v. Younger*, 316 F. Supp. 340, 342-344 (C.D. Cal. 1970), appeal dismissed, 401 U.S. 902 (1971).

lishers of the copyrighted songs included on the bootleg albums or to MGM, the owner of the copyrights on the movie soundtracks from which some of the albums were duplicated. Nor did petitioner and his co-defendants make any payments to RCA, which had acquired from Presley the exclusive right to manufacture and distribute recordings of Presley performances. Petitioner's sale of the thousands of bootleg albums necessarily diminished the commercial opportunities available to all who participated in the production and sale of legitimate Presley recordings, including Elvis Presley himself (and his estate after his death in 1977), copyright proprietors, RCA, wholesalers, and retailers.

The eight Section 2314 counts on which petitioner was convicted (J.A. A6-A8) were based on one stage of the operation—petitioner's eight truck shipments of bootleg albums from California to Maryland or Florida prior to their distribution to customers. Each of these shipments included thousands of albums; the total value of each shipment (based on the advertised list prices) ranged from \$40,000 to \$157,000. See *id.* at A24-A33.

Petitioner contends in his opening brief that these shipments may not form the basis for charges of interstate transportation of stolen property, in violation of Section 2314, and that the government was confined to prosecuting him for misdemeanor copyright violations based on his participation in other stages of the operation. The court of appeals rejected petitioner's claim, citing its decision in *United States v. Belmont*, *supra*, a case involving interstate transportation of unauthorized videotape cassettes made by duplicating copyrighted motion pictures.¹³ The Eleventh and District of Columbia

¹³ Before *Belmont*, the Ninth Circuit had held on several occasions that interstate transportation of unauthorized duplicates of copyrighted material could form the basis for Section 2314 charges. See *United States v. Atherton*, 561 F.2d 747, 752 (9th Cir. 1977) (motion pictures); *United States v. Drebin*, 557 F.2d 1316, 1332 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978) (motion pictures). Cf. *United States v. Wise*, 550 F.2d 1180, 1183 & n.3 (9th Cir.), cert. denied, 434 U.S. 929 (1977) (motion for acquittal).

Circuits likewise have concluded that interstate transportation of unauthorized duplicates of copyrighted materials may violate Section 2314. *United States v. Drum*, 733 F.2d 1503, 1505-1506 (11th Cir. 1984), cert. denied, Nos. 84-328, 84-5163, 84-5219, and 84-5319 (Nov. 26, 1984) (sound recordings); *United States v. Gottesman*, 724 F.2d 1517, 1519-1521 (11th Cir. 1984) (motion pictures), citing *United States v. Gottesman*, 685 F.2d 1387 (11th Cir. 1982) (Table), cert. denied, 460 U.S. 1014 (1983) (motion pictures); *United States v. Whetzel*, 589 F.2d 707, 710 n.10 (D.C. Cir. 1978) (sound recordings). See also *United States v. Gallant*, 570 F. Supp. 303, 310-314 (S.D.N.Y. 1983) (sound recordings); *United States v. Sam Goody, Inc.*, 506 F. Supp. 380, 385-391 (E.D.N.Y. 1981) (sound recordings). The Seventh Circuit has assumed the application of Section 2314 in a case involving transportation of sound recordings. *United States v. Berkowitz*, 619 F.2d 649, 656-658 (1980).

Only the Fifth Circuit, in a case involving off-the-air recording of motion pictures, with subsequent manufacture and shipment of unauthorized copies, has concluded that interstate transportation of unauthorized duplicates of copyrighted material is outside the scope of Section 2314. See *United States v. Smith*, 686 F.2d 234 (1982). In his opening brief, petitioner relies heavily on the reasoning of *Smith*. But the *Smith* court's analysis of the language and history of Section 2314 is faulty. A proper analysis of the statutory language and legislative history and of petitioner's conduct in this case shows that petitioner was correctly charged with interstate transportation of stolen property. Petitioner's reading of Section 2314 would immunize from the coverage of that provision a significant class of interstate shipments of illicitly acquired property that can yield enormous commercial gains to the participants—a result wholly contrary to the intent of Congress.

granted on Section 2314 counts because of government's failure to prove jurisdictional requirement that transported motion picture prints had a value of \$5,000 or more).

A. The Language of Section 2314 Encompasses Interstate Shipments of Bootleg Record Albums

The starting point for interpretation of a statute is the language of the statute itself. *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Lewis v. United States*, 445 U.S. 55, 60 (1980). Section 2314 imposes penalties on, inter alia, anyone who "transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud."

1. Applying a common sense reading of the statute, there can be no doubt that petitioner's shipments of the bootleg record albums from the West Coast to the East Coast fit within the language of Section 2314. Petitioner unquestionably caused the interstate transportation of "goods, wares, [or] merchandise," i.e., the bootleg albums. Petitioner does not dispute that he caused the eight interstate shipments of albums described in the indictment; the testimony to which he stipulated summarizes information from the trucking company bills of lading issued in connection with those shipments (see J.A. A24-A33). Petitioner also does not deny that each of the shipments had a value of \$5,000 or more.

Moreover, the bootleg albums that petitioner shipped are properly characterized as "stolen, converted or taken by fraud." Of course, the records themselves (i.e., the physical objects) were not stolen from others; rather, they were manufactured at the direction of petitioner and his co-defendants. But there were clearly thefts, conversions, and fraudulent takings of the tapes or acetates that contained the sounds that were transferred onto the bootleg albums. For example, the outtakes of Presley studio performances and soundtracks of Presley motion pictures were removed from company vaults without authorization; co-defendant Theaker paid a bribe of \$20,000 to an NBC employee in order to obtain tapes of Presley television performances that were not authorized for release; and petitioner himself obtained a tape of a Presley

concert by making misrepresentations to the owner. See pages 5-6, *supra*. In addition, petitioner and his co-defendants directed the transfer of sounds from these illicitly obtained recordings onto the bootleg albums without authorization from those who had copyright and other forms of property interests in the recordings. There was ample evidence that petitioner knew that the Presley materials used to produce the bootleg albums had been stolen from RCA and other sources.¹⁴ Petitioner also was aware that unauthorized copying and distribution of the Presley recordings violated the exclusive rights of, inter alia, the composition copyright owners and RCA, which owned the exclusive right to manufacture and distribute Presley sound recordings.¹⁵

¹⁴ For example, petitioner wrote "RCA Stolen Tapes" on a box containing the master tape used to produce the bootleg album "The Legend Lives On" (Anderson Stiptest. 11; Deary Stiptest. 37-39; Tr. 111-112). Aca "Ace" Anderson testified that petitioner told him that co-defendant Theaker had paid a \$20,000 bribe to an NBC employee to obtain Presley tapes and had paid \$500 per Presley tape to a Radio Recorders employee (Anderson Stiptest. 18-19). Anderson also testified that he was told by petitioner and Theaker that they were wary of any unusually large record orders, because they could be charged with interstate transportation of stolen property if they shipped more than \$5,000 worth of records (J.A. A19-A20). Petitioner, Theaker, and Anderson met with Theaker's attorney in Los Angeles to discuss whether they should continue to manufacture the bootleg albums and possible defenses to a criminal prosecution. Anderson testified that petitioner and Theaker stated that they would continue to manufacture the records and that if they were prosecuted they could claim they believed that anyone could manufacture Presley records after his death. J.A. A19. The record includes correspondence from Theaker to petitioner addressed "Hi, Pirate;" on one occasion, Theaker wrote to petitioner, "Pirate baby, we're either going to get (1) real big, (2) busted, or (3) make nice albums and no money." Anderson Stiptest. 13; GX 181, 185, 191.

¹⁵ Anderson testified that in 1977 petitioner told him that only RCA was authorized to produce records of Elvis Presley's singing (J.A. A16). On another occasion, petitioner told Anderson that the tapes acquired from Radio Recorders contained so many songs by Harvey Zimmerman (see *id.* at A43) that if petitioner and Theaker were paying the required royalties, Zimmerman would

The only arguable response to this analysis is that the physical objects transported over state lines (*i.e.*, the bootleg albums) were not technically "the same" physical objects that were removed from the possession of RCA and the other custodians of the Presley recordings. It was the intangible sounds, or performances, that were the real object of the theft. Those sounds were duplicated from the original stolen objects onto different physical objects (the vinyl of the bootleg albums); it was these duplicates that moved over state lines.

We think it clear, however, that the transcription of sounds from one physical object to another should not make a difference for purposes of Section 2314. So far as we are aware, there has never been any suggestion that altering a physical object (*e.g.*, repainting stolen cargo or removing identifying labels) before it is transported in interstate commerce would allow a defendant to escape Section 2314 penalties, on the theory that the item transported was not precisely "the same" as the item stolen. See, *e.g.*, *United States v. Moore*, 571 F.2d 154, 158 (3d Cir.), cert. denied, 435 U.S. 956 (1978) (for purposes of Section 2314, counterfeit printed Ticketron tickets transported in interstate commerce were "the same" property as blank Ticketron tickets that were stolen); *United States v. Gallant*, 570 F. Supp. at 311 n.10 ("Nearly every court considering an indictment under § 2314 has not read the words 'the same' to require literally that what is transported be in exactly the same form as what was stolen."). In a case like this one, the physical form of the stolen items is secondary to the sounds that are recorded on them. In these circumstances, a defendant should not be permitted to escape the penalties of Section 2314 by the transfer of the sounds from one physical object to a different physical object that was never possessed by the original owner.

receive an amount equal to what he already was receiving from RCA (Anderson Stiptest. 15). At trial, petitioner did not contest the copyright infringement charges against him (Tr. 33).

That is particularly so in the case of an individual like petitioner, who was well aware of the criminal nature of both the taking of the original object and the unauthorized copying of sounds.

Even before the record and motion picture piracy cases, the lower courts had held that Section 2314 applies where a defendant has transported a duplicate, rather than the original stolen object. In *United States v. Lester*, 282 F.2d 750, 755 (3d Cir. 1960), cert. denied, 364 U.S. 937 (1961), the court rejected the claim that interstate transportation of photostatic copies of stolen geophysical maps did not fall within Section 2314 because the copies were not stolen property. The court noted that the defendant himself had acknowledged that it was the idea, rather than its material paper embodiment, that was valuable.

In *United States v. Bottone*, 365 F.2d 389 (2d Cir.), cert. denied, 385 U.S. 974 (1966), the court considered a scheme involving the theft, copying, and transportation of trade secret materials. Documents describing a manufacturing process for improved strains of microorganisms used to produce certain antibiotics had been removed from a company's file in New York, copied, and returned to company files. The copies were then transported to New Jersey, and subsequently to Italy. Judge Friendly, writing for the court, had no difficulty concluding that papers describing manufacturing procedures constituted "goods, wares, [or] merchandise" within the meaning of Section 2314. 365 F.2d at 393. He viewed as a more serious question whether the papers that were transported constituted goods that had been "stolen, converted or taken by fraud." Judge Friendly concluded, however, that it should not make a difference that intangible information had been "transformed and embodied in a different physical object." *Ibid.* "In such a case," he wrote, "when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial. It

would offend common sense to hold that these defendants fall outside the statute simply because, in efforts to avoid detection, their confederates were at pains to restore the original papers to Lederle's files and transport only copies or notes, although an oversight would have brought them within it." *Id.* at 393-394.

In this case, it is musical sounds, rather than trade secret information, that constitute the intangible component of the stolen items. But the principle expressed in *Lester* and *Bottone*—that transfer of intangible intellectual property from one physical object to another should not allow a defendant to escape Section 2314 penalties—applies equally to this case.

2. Petitioner contends (Br. 21-26) that his conduct is not covered by the terms of Section 2314 because a copyright does not constitute "goods, wares, [or] merchandise" within the meaning of the statute. But neither the government nor the court of appeals has suggested that petitioner transported copyrights across state lines.¹⁶ The indictment charges that petitioner transported in interstate commerce "phonorecords * * * containing Elvis Presley performances of copyrighted musical compositions" (J.A. A6, A8). The court of appeals likewise referred to petitioner's shipment of "bootleg phonorecords," or "phonorecords of copyrighted material" (Pet. Supp. App. A10).

¹⁶ The Fifth Circuit in *United States v. Smith*, 686 F.2d at 239-241, similarly erred when it focused on copyrights, rather than on the videotape cassettes that were transported, in analyzing whether that case involved "goods, wares, [or] merchandise."

The existence of a copyright or other proprietary interest in a recording of a musical performance or in a musical composition may cause the unauthorized copying of musical sounds to constitute theft or conversion. See pages 28-34, *infra*. But it is not the copyright itself that is transported over state lines; rather, it is the unauthorized copies. See *United States v. Whetzel*, 589 F.2d at 710 (the defendant "was not transporting the right to produce legitimate tapes," but rather unauthorized tapes of copyrighted sound recordings). More generally, when any item is stolen and transported in interstate commerce, it is not the owner's possessory interest that is transported, but rather the item itself.

Petitioner asserts more generally that "the common or usual meaning of the phrase 'goods, wares, and merchandise' encompasses tangible identifiable items, not intangible incorporeal property rights" (Pet. Br. 23-24). Petitioner may be suggesting that a record album should not be regarded as "goods, wares, [or] merchandise" if its value derives primarily from intangible sounds that are protected by some form of artistic property right, rather than from the physical material on which the sounds are recorded. That contention cannot be squared with the cases in which courts have concluded that items with significant intangible components, such as geophysical maps and papers bearing trade secret information, qualify as "goods, wares, [or] merchandise" within the meaning of Section 2314. See *United States v. Greenwald*, 479 F.2d 320 (6th Cir.), cert. denied, 414 U.S. 854 (1973); *United States v. Bottone*, *supra*; *United States v. Lester*, *supra*; *United States v. Seagraves*, 265 F.2d 876 (3d Cir. 1959). In any event, the language of Section 2314 provides no support for such a contention.

Nothing on the face of Section 2314 distinguishes among different types of property depending on whether they have an intangible component. Congress's listing of terms—"goods, wares, merchandise, securities or money"—suggests that it intended to sweep broadly. The original title Congress gave to the statute—the National Stolen Property Act—supports that suggestion. Use of the general term "property" in the title is evidence that Congress meant the listing of terms in the text to constitute a comprehensive listing that would include both tangibles and intangibles. See *Brotherhood of Railroad Trainmen v. Baltimore & O. R.R.*, 331 U.S. 519, 529 (1947). The modern legal understanding of the term "property" clearly embraces even those interests that are entirely intangible.

Property is a term of broad significance, embracing everything that has exchangeable value, and every interest or estate which the law regards of sufficient value for judicial recognition. The word may be

properly used to signify any valuable right or interest protected by law. * * *

The term * * * extends to every species of valuable right and interest, including real and personal property, easements, franchises and other incorporeal hereditaments.

* * * * *

The term has a very broad meaning, and when used without qualification, either express or implied, it may reasonably be construed to include obligations, rights and other intangibles as well as personal things.

1 G. Thompson, *Commentaries on the Law of Modern Real Property* § 5, at 25-26, 29-30 (1980 repl.) (footnotes omitted). Of course, property that is the subject of Section 2314 normally will have some tangible aspect, since by definition it is transported in interstate commerce.¹⁷ But in the absence of any express limitation, there is no reason to distinguish among transported items on the basis of whether their value derives primarily from the tangible object itself or from an intangible component, such as music recorded in magnetic signals or trade secret information embodied in writing.¹⁸

¹⁷ Petitioner quotes the statement of the court in *United States v. Bottone*, 365 F.2d at 393, that "where no tangible objects were ever taken or transported, a court would be hard pressed to conclude that 'goods' had been stolen and transported within the meaning of § 2314." Pet. Br. 25. In this case, however, tangible objects were both taken and transported. The facts of this case thus are quite different from the hypothetical situation to which the *Bottone* court referred in connection with this passage, in which an individual would memorize a chemical formula, travel across state lines, and write down the information in a different state.

¹⁸ If petitioner or his cohorts had broken into an RCA warehouse and stolen records whose physical components were worth less than \$5,000 but whose market value was greater because of the value of the sounds they would produce—an intangible component of value—no one could seriously contend that subsequent interstate shipment of the stolen records did not come within Section 2314 on the ground that almost the entire value of such goods came from their intangible component.

The lower courts have correctly recognized that the real focus of the terms "goods, wares, [and] merchandise" is not on the tangible or intangible source of value of transported items, but on their commercial nature. In particular, the terms "wares" and "merchandise" suggest items that may be bought and sold. "The terms 'goods, wares, merchandise' is [sic] a general and comprehensive designation of such personal property or chattels as are ordinarily a subject of commerce." *United States v. Seagraves*, 265 F.2d at 880. Accord, *American Cyanamid Co. v. Sharff*, 309 F.2d 790, 796 (3d Cir. 1962); *United States v. Sam Goody, Inc.*, 506 F. Supp. at 388 (on their face, the terms "goods, wares, [and] merchandise" "appear to have been intended to extend broadly to all types of property likely to move in commerce, with no distinction between items of a completely tangible character and items of a mixed tangible-intangible character"). See also *In re Vericker*, 446 F.2d 244, 248 (2d Cir. 1971).¹⁹

Property that has a significant intangible component—e.g., trade secrets, or intellectual or artistic property—unquestionably may have commercial value and may constitute a subject of trade. See, e.g., *Ruckelshaus v. Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 12-15 (trade secrets); *International News Service v. Associated Press*, 248 U.S. 215 (1918) (news gathered by news agency).²⁰ Indeed, in *International News Service*

¹⁹ The statutory concern with items of a commercial nature is emphasized by the requirement that the items transported have "value," a concept that ordinarily refers to worth in a commercial context. See 18 U.S.C. 2311 ("[v]alue" means the "face, par, or market value * * *"); see also *United States v. Berkowitz*, 619 F.2d at 656-658; *United States v. Sam Goody, Inc.*, 506 F. Supp. at 388.

²⁰ In *Monsanto*, this Court held that health, safety and environmental data cognizable as trade secrets under state law constituted property for purposes of the Taking Clause of the Fifth Amendment, despite the intangible nature of such data. The Court explained that trade secrets have many of the characteristics of more tangible forms of property; for example, such secrets are assignable, they can form the *res* of a trust, and they can pass to a

the Court specifically referred to news matter gathered by an agency as "goods" and "merchandise." *Id.* at 236, 242; see note 20, *supra*. This Court has specifically recognized the commercial value of tapes and records containing musical performances by popular artists and the significance of pirated records and tapes in the recording industry. See *Goldstein v. California*, 412 U.S. 546, 549-550, 571 (1973). See also page 12 note 12, *supra*; *United States v. Sam Goody, Inc.*, 506 F. Supp. at 388 ("[c]ounterfeit tapes are able to be moved, marketed, sold, and traded, both within the industry and between the industry and the public"). The evidence in this case shows that the bootleg albums shipped by petitioner had commercial value amounting to hundreds of thousands of dollars and were the subject of vigorous trade through the mail order business conducted by petitioner and his co-defendants. See pages 6-7, *supra*.

Petitioner cites (Br. 24) the Fifth Circuit's discussion of dictionary definitions in *United States v. Smith*, *supra*, in support of his contention that Section 2314 refers only to tangible goods. The court in *Smith* found it significant (686 F.2d at 240) that the phrase "goods, wares, and merchandise" is defined in *Black's Law Dictionary* 624 (5th ed. 1979) as "[a] general and comprehensive des-

trustee in bankruptcy (slip op. 13-14). The Court also noted that Congress had perceived that data developers have a proprietary interest in their data and that "[t]his general perception of trade secrets as property is consonant with a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labour and invention'" (*id.* at 14, quoting 2 W. Blackstone, *Commentaries* *405).

In *International News Service*, the Court concluded that news matter was the subject of sale and must be regarded as quasi property, at least as between competitors. The Court noted that news matter "is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise." 248 U.S. at 236. The Court concluded that a news agency that used a competitor's news matter in its own service was engaged in misappropriation in "sell[ing] complainant's goods as its own." *Id.* at 242.

ignation of such chattels and goods as are ordinarily the subject of traffic and sale;" the term "chattel" is defined as "[a]n article of personal property, as opposed to real property" (*id.* at 215); and the term "goods" is defined in one sense as "every species of personal property" and in another sense as "all tangible items" (*id.* at 624).

The definitions cited by the *Smith* court confirm that the terms "goods, wares, [and] merchandise" refer to property that normally is the subject of commerce.²¹ But contrary to the *Smith* court's conclusion, the definitions do not suggest any limitation to tangible items. The term "personal property," used in the definitions of "chattels" and "goods," in turn is described as "divisible into (1) corporeal personal property, which includes movable and tangible things * * * and (2) incorporeal personal property, which consists of such rights as personal annuities, stocks, shares, patents, and copyrights." *Black's Law Dictionary, supra*, at 1096.²² The dictionary definition approach therefore does not support the conclusion for which petitioner contends, but rather the common sense view that Section 2314 covers transportation of items that include both tangible and intangible components, such as bootleg record albums.²³

²¹ See also the definition of "merchandise": "All goods which merchants usually buy and sell, whether at wholesale or retail; wares and commodities such as are ordinarily the objects of trade and commerce." *Black's Law Dictionary, supra*, at 890.

²² Dictionary definitions thus contradict even petitioner's straw man contention (see page 19, *supra*) that a copyright could not come within the phrase "goods, wares, [or] merchandise."

²³ Petitioner's attempt to isolate the intangible components of the bootleg albums for purposes of the "goods, wares, [or] merchandise" inquiry is inconsistent with reality. "The instrumentality of commercial revenue is the entire entity—the sounds plus the medium of embodiment * * * once [record] and sounds are joined the resulting product is a single entity." *United States v. Sam Goody, Inc.*, 506 F. Supp. at 388. Indeed, it could be said that "the intangible idea protected by the copyright is effectively made tangible by its embodiment upon the [records]." *United States v. Gottesman*, 724 F.2d at 1519-1521.

3. Petitioner further contends (Br. 26-32) that nothing he transported was "stolen, converted or taken by fraud" within the meaning of Section 2314. In a variation on his contention concerning the terms "goods, wares, [and] merchandise," he asserts that only tangible objects can be stolen or converted and that copyright infringement may not be equated with stealing or conversion.

At the outset, it should be noted that the wrongful takings in this case entailed far more than copyright infringement.²⁴ The various tapes and acetates that contained the sounds transferred to the bootleg albums were either stolen (*e.g.*, from RCA vaults) or taken by fraud (*e.g.*, from the owner of the Pittsburgh New Year's Eve concert tape, who was deceived by the misrepresentation that petitioner intended to use the tape only for noncommercial purposes). See pages 5-6, *supra*.²⁵ As we ex-

²⁴ The indictment alleges that the bootleg albums were stolen, converted, and taken by fraud "in that they were manufactured without the consent of the copyright proprietors" (J.A. A7, A8), and the stipulated testimony concerning the value of the bootleg albums segregates a portion attributed to the copyrighted musical compositions (*id.* at A24-A33). As we discuss at pages 26-34, *infra*, we believe unauthorized copying, in violation of the rights of copyright proprietors and others with property interests in the material copied, is in itself sufficient to render the duplicates "stolen, converted or taken by fraud" within the meaning of Section 2314. However, the evidence to which petitioner stipulated on its face demonstrates alternative and indisputable grounds for characterizing the contents of the bootleg albums as stolen, converted or taken by fraud.

²⁵ In the case of the unreleased tapes that were stored by RCA or other recording companies, it is unclear from the evidence whether petitioner and his co-defendants obtained possession of the actual tapes that had been taken from company vaults or copies made from the original tapes. However, the record is clear that the custodians of the original tapes never authorized their release and did not permit access by unauthorized persons. See J.A. A22-A23, A34, A38-A39, A42-A43, A46. Even if the original tapes were never removed from company premises, but were copied by employees and returned to the vaults, there were original thefts of

plained above (pages 17-19), the fact that the sounds were transferred from one physical object to another should not permit a defendant to escape Section 2314 penalties. Thus, whether or not the property interests embodied in a copyright can be "stolen, converted or taken by fraud" by the act of unauthorized copying alone, the original thefts and fraudulent takings of the tapes and acetates are sufficient to render the contents of the bootleg albums transported by petitioner "stolen, converted or taken by fraud."

But even in cases in which there has been no original wrongful taking of a tangible object,²⁶ wrongful duplication of musical sounds or images would be grounds for characterizing the copies as "stolen, converted or taken by fraud." Each of the statutory terms—"stolen," "converted," and "taken by fraud"—is a broad one that connotes a wide range of wrongful takings. Thus, the terms "stealing" and "stolen" had no established meaning at common law and generally are not interpreted as confined to common-law larceny. See *Bell v. United States*, 462 U.S. at 360; *United States v. Turley*, 352 U.S. 407, 412 (1957); *Factor v. Laubenheimer*, 290 U.S. 276, 303 (1933). The term "conversion" is even broader than stealing. Conversion "may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to

tangible items. See, e.g., *United States v. DiGilio*, 538 F.2d 972, 976-978 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Cf. *Pearson v. Dodd*, 410 F.2d 701, 707-708 (D.C. Cir.), cert. denied, 395 U.S. 947 (1969).

²⁶ For example, a defendant could transport records or tapes that were manufactured by copying albums purchased at a record store. See *Goldstein v. California*, *supra*; *United States v. Drum*, *supra*. Alternatively, a defendant could transport records or tapes manufactured from a tape made by an audience member at a concert or from a recording of a television show. See, e.g., *United States v. Smith*, *supra*; *United States v. Gallant*, *supra*; cf. *Sony Corp. v. Universal City Studios, Inc.*, No. 81-1687 (Jan. 17, 1984).

an unauthorized extent of property placed in one's custody for limited use." *Morissette v. United States*, 342 U.S. 246, 271-272 (1952). See also *United States v. DiGilio*, 538 F.2d 972, 978 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). The term "taken by fraud" likewise is broad enough to encompass a variety of wrongful takings. The listing of all three terms in Section 2314 appears to represent a comprehensive reference to many sorts of misappropriation of property.

The courts have rejected a narrow reading of the terms "stolen, converted [and] taken by fraud." In *United States v. Turley*, 352 U.S. at 412-413, 416-417, this Court concluded that the term "stolen," as used in the National Motor Vehicle Theft Act, now codified at 18 U.S.C. 2312,²⁷ included any felonious taking of a motor vehicle with intent to deprive the owner of the rights and benefits of ownership, without regard to whether the theft constituted common-law larceny. The Court found that a broad interpretation of the term "stolen" would be consistent with the legislative purpose of eliminating interstate traffic in "unlawfully obtained motor vehicles" (352 U.S. at 417). The Court noted that "[p]rofessional thieves resort to innumerable forms of theft and Congress presumably sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion" (*id.* at 416-417; footnote omitted).

The lower courts have followed a similar course in declining to limit Section 2314. They have concluded that Congress intended the phrase "stolen, converted or taken by fraud" to comprehend not only common-law larceny, but any criminal appropriation of another's property that deprives the owner of the rights and benefits of ownership. See, e.g., *United States v. McClain*, 545 F.2d 988, 994-995, 1001 (5th Cir. 1977); *Lyda v. United States*, 279 F.2d 461, 463 (5th Cir. 1960); *Bergman v. United States*, 253 F.2d 933, 935 (6th Cir. 1958) (Stewart, J.)

²⁷ Section 2314 was enacted as an extension of the National Motor Vehicle Theft Act. See pages 35-36, *infra*.

("[t]he issue as to whether the goods were obtained by one of the unlawful methods of acquisition referred to in [18 U.S.C. 2314 and 2315] is not to be decided upon the basis of technical common law definitions"); *United States v. Handler*, 142 F.2d 351, 353 (2d Cir.), cert. denied, 323 U.S. 741 (1944); *United States v. Sam Goody, Inc.*, 506 F. Supp. at 391 (terms should be interpreted "on a broad common-sense basis encompassing all forms of wrongfully depriving an owner of the possession or use of his property"); *United States v. Plott*, 345 F. Supp. 1229, 1231 (S.D.N.Y. 1972) ("the words 'stolen' and 'converted' cover a broad range of wrongful acts").

The terms "stolen" and "converted," as they are used in Section 2314, are broad enough to cover unauthorized copying from a sound recording. Such unauthorized copying constitutes misappropriation from those who have property interests in the recording. Once the sounds are embodied in a bootleg album, the album itself is fairly characterized as stolen or converted property for purposes of Section 2314.²⁸

Property interests associated with a sound recording have several sources. Those who hold copyrights on the musical compositions performed (and, in the case of sound recordings fixed after February 15, 1972, those who hold a copyright on the sound recording itself, see pages 3-4 note 4, *supra*) have property interests that are protected by federal statute. See, e.g., *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 290-291, 296-299 (1907). Those interests include the exclusive rights to duplicate and distribute the copyrighted work. 17 U.S.C. 106. State statutes, too, may create property in-

²⁸ In this case, as in the other Section 2314 cases that have involved unauthorized copying of sound recordings or motion pictures, there was actual rerecording, or transfer of sounds or images from one medium to another, in an attempt to reproduce precisely a particular performance. These cases thus involve more than mere use of a copyrighted composition to create a product containing an entirely new performance.

terests in a sound recording (at least to the extent such statutes are not preempted by the federal copyright laws). See *Goldstein v. California*, 412 U.S. at 571 (California "has, by statute, given to recordings the attributes of property"); *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 570, 142 Cal. Rptr. 390, 400 (1977), appeal dismissed and cert. denied, 436 U.S. 952 (1978); Cal. Penal Code § 653h (West Supp. 1985) (imposing penalties for unauthorized transfer of sounds from records or tapes with intent to sell). Finally, the courts have recognized certain common law property interests in sound recordings, including interests of artists in recordings of their own performances and interests of recording companies that have acquired the exclusive rights to manufacture and distribute recordings of particular performances. See, e.g., *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 725 (9th Cir. 1984) ("Under California law, Lone Ranger TV would have an intangible property interest in the performances on tape from the time of their recording."); *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 662-663 (2d Cir. 1955) (literary property under New York law, in the form of exclusive right to manufacture and sell records of certain performances by highly gifted artists, was not lost by putting records on public sale); *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d at 570 (recorded performances constitute record company's intangible personal property); *Baez v. Fantasy Records, Inc.*, 144 U.S.P.Q. (BNA) 537, 539 (Cal. Super. 1964) (folk singer has common law property right in her musical interpretations, renditions and performances inscribed on audition tape); Cal. Civ. Code § 980(a)(2) (West Supp. 1985) (codifying state recognition of ownership rights in sound recordings fixed prior to 1972).²⁹

²⁹ The amicus brief filed by the Recording Industry Association of America, Inc., in *Goldstein v. California*, *supra*, describes (at pages 21-26) additional cases in which unauthorized duplication of

Congress has viewed unauthorized duplication of recordings in violation of the copyright laws as the equivalent of stealing or conversion. When Congress in 1982 increased the penalties for copyright infringement involving piracy of sound recordings and audiovisual works, it included the new penalty provision, 18 U.S.C. 2319, in the chapter of Title 18 entitled "Stolen Property." See also S. Rep. 97-274, 97th Cong., 1st Sess. 6 (1981) (quoting Justice Department testimony that "[a]s compared to other theft and forgery statutes, penalties for copyright, piracy and counterfeiting are among the most lenient * * *"). The courts, too, have described copyright infringement in these terms. The Chief Justice, then a circuit judge sitting by designation in a case involving copyright infringement claims, noted that record piracy "might better be described by other terms connoting larceny." *Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263, 269 (2d Cir. 1959) (Burger, J.). See also *Duchess Music Corp. v. Stern*, 458 F.2d 1305, 1311 (9th Cir.), cert. denied, 409 U.S. 847 (1972) (equating "outright appropriation, in violation of copyright, of the actual performances contained on appellants' records" with "steal[ing] the genius and talent of others").

sound recordings has been found to implicate property interests under state law.

The protection of such property interests under state law generally is rooted in the recognition that artists and those in the recording industry who work with them to produce and sell recordings of their performances invest substantial effort, skill, and money and that legal protection of such investments is necessary in order to avoid discouraging invention and free competition. See, e.g., *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 537-538, 82 Cal. Rptr. 798, 805-806 (1969), cert. denied, 398 U.S. 960 (1970). That rationale is similar to the underpinnings of the rights created by the patent and copyright laws and the protection afforded to trade secrets and other fruits of competitive efforts. See, e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480-482 (1974); *Goldstein v. California*, 412 U.S. at 555; *International News Service v. Associated Press*, *supra*.

Courts that have addressed record and tape piracy in terms of interference with state statutory and common law rights likewise have referred to unauthorized copying as a form of stealing or conversion. In *Tape Industries Ass'n of America v. Younger*, 316 F. Supp. 340 (C.D. Cal. 1970), appeal dismissed, 401 U.S. 902 (1971), the three-judge court explained that record pirates "actually take and appropriate the product itself—the sounds recorded on the albums—and commercially exploit the product;" they are engaged in "selling for a reduced price another person's *stolen and appropriated product* for which the public customarily pays." *Id.* at 350 (emphasis added). The court went on to characterize California's imposition of criminal penalties for record and tape piracy as a "permissible state regulation directed against *theft* and appropriation of a saleable product," regardless of whether it was "deemed a *larceny* statute or an unfair competition law." *Id.* at 351 (emphasis added). See also, e.g., *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d at 726 (upholding judgment awarding damages for conversion under California law based on unauthorized duplication and distribution of radio program tapes); *Tape Head Co. v. RCA Corp.*, 452 F.2d 816, 819 (10th Cir. 1971) (noting that 1971 amendment to federal copyright statute did not give plaintiffs a "right to convert and use these recordings with impunity prior to February 15, 1972" or to "appropriate the defendants' property, ideas and work" by copying musical recordings without authorization); *People v. Szarvas*, 142 Cal. App. 3d 516, 191 Cal. Rptr. 117, 123 (1983) (defendant who engaged in unauthorized duplication of sound recordings may properly be punished for either record piracy or theft); *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d at 570, 142 Cal. Rptr. at 400 (in case involving unauthorized recording and sale of performances, trial court correctly found that such "misappropriation and sale of the intangible property of another without authority from the owner is conversion"); *Capitol Records, Inc. v. Erick-*

son, 2 Cal. App. 3d 526, 537, 82 Cal. Rptr. 798, 805 (1969), cert. denied, 398 U.S. 960 (1970).³⁰

³⁰ Actions against record and tape pirates are sometimes described in terms of unfair competition, as well as conversion or misappropriation. See, e.g., *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d at 564, 570, 142 Cal. Rptr. at 396-397, 400.

While the original rule was that there could be no conversion of intangible rights, Prosser notes that "this hoary limitation has been discarded to some extent by all of the courts." W. Prosser, *Handbook of the Law of Torts* [hereinafter cited as *Prosser on Torts*] § 15, at 81 (1971). In addition to the record and tape piracy cases, see, e.g., *National Surety Corp. v. Applied Systems, Inc.*, 418 So.2d 847 (Ala. 1982) (intangible personal property can be converted under Alabama law; no error in allowing conversion claim based on unauthorized copying of computer programs to go to the jury).

Petitioner cites this Court's reference to copyright infringement as a "trespass" on a copyright proprietor's right (*Sony Corp. v. Universal City Studios, Inc.*, slip op. 15) as an indication that unauthorized copying may never constitute conversion. The Court did not use the term "trespass" in a technical sense; moreover, the reference is hardly inconsistent with characterization of copyright infringement as a form of theft. See *Bell v. United States*, 462 U.S. at 358 (larceny formerly "was limited to trespassory taking"). It is worth noting that *Sony* involved small scale copying for home use, a very different activity from the massive amounts of unauthorized copying for commercial purposes that occurred in the course of petitioner's bootleg operation.

Petitioner also cites (Br. 27-28) two lower court cases for the proposition that copyright infringement cannot constitute conversion. *Local Trademarks, Inc. v. Price*, 170 F.2d 715, 718 (5th Cir. 1948); *King Brothers Production, Inc. v. RKO Teleradio Pictures, Inc.*, 208 F. Supp. 271, 277 (S.D.N.Y. 1962). Both cases involved the choice of an analogous state statute of limitations in a civil copyright infringement action; in each case the court concluded that under applicable state law (Alabama and California respectively) intangible property could not technically be the subject of an action for conversion and that copyright infringement instead sounded in tort. Petitioner also cites *Porter v. United States*, 473 F.2d 1329, 1337 (5th Cir. 1973), in which the court concluded that an action by the widow of Lee Harvey Oswald for alleged infringement by the government of her common law copyright in his writings could not be a "taking" for constitutional purposes but only a tort. The significance of these cases is unclear, since conversion is often regarded as a tort. See *Prosser on Torts*, *supra*, § 15, at 79.

Against this background, it is not surprising that (with the exception of the Fifth Circuit in *United States v. Smith*, *supra*) all of the courts that have considered the issue have concluded that unauthorized copying by record and tape pirates and bootleggers may constitute stealing or conversion for the purposes of Section 2314. See, e.g., *United States v. Drum*, 733 F.2d at 1506 (noting that "defendants' activities constituted use of copyrighted property in an unauthorized manner"); *United States v. Belmont*, 715 F.2d at 462 (coverage of Section 2314 should not be restricted simply because "thieves devise new ways of appropriating * * * property to their own use"); *United States v. Drebin*, 557 F.2d at 1332 ("illicit copying of a copyrighted work is no less a 'theft, conversion or taking by fraud' than if the original were so taken"). The court in *United States v. Sam Goody, Inc.*, *supra*, explained why, under a common sense approach, the making of unauthorized duplicates of copyrighted musical works easily qualifies as stealing, converting, or taking by fraud: "Such conduct most closely resembles traditional conversion, in that it involves the unauthorized appropriation of property belonging to another party after the property had been lawfully given to the infringer for a limited use, and the requisite intent on the part of the infringer to put the property to his own use and for his own benefit." 506 F. Supp. at 391.

Petitioner cites dictionary definitions of the terms "steal," "conversion," and "take" in support of his claim that his conduct fell outside the scope of Section 2314. Pet. Br. 30-31. But the definitions he quotes all include references to taking or exercise of the rights of ownership of "personal property," "goods," or "chattels" of another. As we explained at page 24, *supra*, dictionary definitions themselves establish that these terms are not confined to tangible property. See also *Black's Law Dic-*

In any event, Congress appears to have used the term "converted" in a less technical sense than the sense in which it is used for purposes of determining applicable state statutes of limitations.

tionary, *supra*, at 300 (defining "conversion" to include "[u]nauthorized and wrongful exercise of dominion and control over another's personal property, to exclusion of or inconsistent with rights of owner"); *id.* at 1272 (defining "stolen" to mean "[a]cquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently"); *id.* at 1303 (defining "take" as, *inter alia*, "to appropriate things to one's own use with felonious intent"). Nothing in these broad definitions shows that the statutory terms exclude wrongful takings in the form of unauthorized copying of musical sounds for use in the manufacture of bootleg albums.³¹

³¹ *United States v. Carman*, 577 F.2d 556 (9th Cir. 1978), and *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159 (2d Cir. 1978), cited by petitioner (Br. 29, 30), do not support his contentions. In those cases, the courts rejected the application of Section 2314 because there was insufficient evidence of ownership of the property at issue. In *Carman* the court concluded that a debtor who had placed money outside the reach of his company's general creditors had not engaged in stealing for purposes of Section 2314, because stealing requires a taking from one having the attributes of an owner. 577 F.2d at 565. In *Long Cove* the court rejected the contention that Section 2314 applied to the taking of clams in violation of state environmental conservation laws without a showing of "some sort of interference with a property interest." 582 F.2d at 163. In this case, both the initial takings of the unreleased sound recordings and the unauthorized duplication of sounds from those recordings clearly interfered with the property interests of others.

If the Court should reject our contention that unauthorized copying from a sound recording in violation of the rights of copyright proprietors or others is alone sufficient to render the duplicates "stolen, converted or taken by fraud" within the meaning of Section 2314, it nevertheless seems clear that this case involved other activities—the wrongful takings of the tapes and acetates from which the contents of the bootleg albums were duplicated—that bring petitioner's shipments within the scope of the statute. See pages 15-19, 25-26 & note 24, *supra*.

B. Interpretation Of Section 2314 To Cover Interstate Shipments Of Bootleg Record Albums is Consistent With The Legislative Purposes Underlying The Statute

The legislative history of Section 2314 demonstrates that Congress's underlying purpose in enacting that provision was to provide comprehensive protection for owners of stolen property. In particular, Congress wished to reach criminals who previously had escaped prosecution by moving stolen property from the jurisdiction where the theft occurred to the jurisdiction of a different sovereign. Interpretation of Section 2314 to cover petitioner's interstate shipments of bootleg albums would further these legislative purposes.

1. Section 2314 was enacted as an extension of the National Motor Vehicle Theft Act (also known as the Dyer Act), the predecessor to 18 U.S.C. 2312. In 1919, Congress legislated against the background of an epidemic of automobile thefts, particularly in areas contiguous to state lines. Thieves would transport stolen vehicles across state lines in order to conceal or dispose of them and to escape liability by fleeing the law enforcement authorities of the jurisdiction where the theft had taken place. See 58 Cong. Rec. 5474-5475 (1919) (remarks of Rep. Newton). The House committee stressed that "[t]he losses to the people of the United States by reason of this stealing amounts [sic] to hundreds of thousands of dollars every year." H.R. Rep. 312, 66th Cong., 1st Sess. 1 (1919).

In explaining the new legislation, the House committee emphasized the broad constitutional power of Congress. The committee observed that the purpose of the Commerce Clause was "to regulate and promote the freedom of commercial intercourse * * *. To render intercourse commerce there must be present the element of transportation. Transportation is essential to commerce, * * * and the commodities transported may be tangible or intangible. Neither are they limited to those known at the time of the adoption of the Constitution." H.R. Rep. 312,

supra, at 3 (emphasis added). Congress clearly did not view its authority in this field as limited to property in any narrow, traditional sense; rather, transportation in commerce could extend to both tangible and intangible commodities.³² Congress's real concern was to prevent stolen property from moving in interstate commerce. "No good reason exists why Congress * * should not provide that such commerce [among the states] should not be polluted by the carrying of stolen property from one State to another." *Id.* at 4.

2. In 1934, Congress enacted the National Stolen Property Act, now Section 2314, in order "[t]o extend the provisions of the National Motor Vehicle Theft Act to other stolen property." Ch. 333, 48 Stat. 794 *et seq.*³³ The 1934 statute was introduced as a bill to extend the National Motor Vehicle Theft Act "to cover *all* property, with certain limitations as to value." 78 Cong. Rec. 2947 (1934) (emphasis added). Senator Ashurst listed the proposed extension as one of a group of "antigangster bills." *Id.* at 2946-2947. At the time he introduced these bills, Senator Ashurst submitted a letter from the Attorney General explaining that the proposed legislation was a response to the growth of certain types of crime perpetrated by groups of gangsters whose activities were

³² The House Committee did observe that automobiles were tangible property. H.R. Rep. 312, *supra*, at 4. However, there is no suggestion that the observation was meant to limit the reach of subsequent legislation; the committee merely used this point to emphasize that automobiles were articles capable of being transported in commerce and were therefore a proper subject of Congress's attention.

³³ At the time of its initial enactment in 1934, the National Stolen Property Act provided in pertinent part (§ 3, 48 Stat. 794-795):

Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of \$5,000 or more theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished * * *.

not confined to any particular locality and who, in accordance with organized plans, moved across state lines to take advantage of the limited jurisdiction and lack of central coordination of law enforcement efforts of the states. The new legislation was intended to eradicate crimes committed by "[t]he roving criminal [who] exists and thrives by seizing the advantages of scientific improvements." *Id.* at 2947.³⁴

The Senate report, the House report, and the conference report all referred to the new legislation as an extension of the National Motor Vehicle Theft Act "to other stolen property," without any indication of a limitation on the type of property covered, other than the \$5,000 minimum value requirement. S. Rep. 538, 73d Cong., 2d Sess. 1 (1934); H.R. Rep. 1462, 73d Cong., 2d Sess. 1 (1934); H.R. Rep. 1599, 73d Cong., 2d Sess. 1, 3 (1934). See also H.R. Rep. 1462, *supra*, at 2 (bill "is designed to punish interstate transportation of stolen property, securities, or money"). Congress's choice of the terms "goods, wares, or merchandise, securities, or money" reflected its decision to consolidate one set of bills (S. 2251 and H.R. 6919) addressing "goods, wares or merchandise," a second set of bills addressing "securities of every description" (S. 2250 and H.R. 6914), and the Attorney General's suggestion that "money" be added. S. Rep. 538, *supra*, at 1-2.³⁵ It is reasonable to assume that Congress believed that in combining all of the terms used in the

³⁴ In a memorandum reproduced in the Senate report, the Department of Justice noted that proposed legislation imposing federal criminal penalties for interstate transportation of stolen property had failed in 1926 and 1930 because of congressional concern that it would burden federal law enforcement resources that were already strained as a result of the Dyer Act. S. Rep. 538, 73d Cong., 2d Sess. 2 (1934). In response to that concern, the 1934 legislation limited coverage by imposing a \$5,000 minimum value. See *ibid.*; H.R. Rep. 1462, 73d Cong., 2d Sess. 2 (1934).

³⁵ The Attorney General also suggested coverage of interstate transportation of "counterfeits," but such a provision was not added until 1939, when the statute was amended to reach transportation of counterfeited securities. See note 36, *infra*; S. Rep. 538, *supra*, at 2.

different legislative proposals it would accomplish the purpose stated in the legislative history—extension of the National Motor Vehicle Theft Act to “all other property.”

The 1934 statute referred to property “theretofore stolen or taken feloniously by fraud or with intent to steal or purloin.” § 3, 48 Stat. 794. In 1939, Congress added the words “feloniously converted,” in order to extend coverage to “embezzled property, securities and money.” Act of Aug. 3, 1939, ch. 413, § 1, 53 Stat. 1178; H.R. Rep. 422, 76th Cong., 1st Sess. 1 (1939); see also S. Rep. 674, 76th Cong., 1st Sess. 1 (1939) (statute amended “[t]o include embezzled as well as stolen property”).³⁶

³⁶ At the same time, Congress extended the Act to cover transportation of counterfeit securities and counterfeiting instruments and tools, without regard to any monetary limit. Congress presumably believed that counterfeit securities could not be described as “stolen” or “taken feloniously by fraud,” since they are manufactured by engraving a plate and producing certificates that purport to be unique, rather than by transferring information of value from some genuine item. See S. Rep. 674, *supra*, at 2. A counterfeit security is therefore different from a pirated, counterfeit, or bootleg recording, which is made by unauthorized transfer of valuable sounds and which has value because it embodies a precise duplicate of the original sounds.

Section 2314 assumed its present form in 1948 and 1949, when the federal criminal code was revised. No substantive changes were made at that time. See H.R. Rep. 304, 80th Cong., 1st Sess. A146 (1947); H.R. Rep. 352, 81st Cong., 1st Sess. 1, 9 (1949). In 1956, Congress added a section penalizing transportation of persons in connection with confidence game swindles. Act of July 9, 1956, ch. 519, 70 Stat. 507. In 1961, a reference to fraudulent tax stamps was added. Pub. L. No. 87-371, 75 Stat. 802 *et seq.* And in 1968 Congress added a new paragraph prohibiting the transportation of traveler's checks bearing forged counter-signatures. Pub. L. No. 90-535, 82 Stat. 885. The latter amendment was made in response to *Streett v. United States*, 331 F.2d 151 (8th Cir. 1964), which held that the statutory reference to forged securities signified only forgery in the making or execution of an instrument and not forgery of a signature on a validly executed instrument. Both the Senate and House committees noted that they had been advised by an industry source that organized crime gangs were involved in the theft and cashing of traveler's checks. S. Rep. 637, 90th Cong., 1st Sess. 2 (1967); H.R. Rep. 1728, 90th Cong., 2d Sess. 2 (1968).

Interpretation of Section 2314 to cover interstate transportation of bootleg record albums is entirely consistent with Congress's intent to create a comprehensive and effective law enforcement tool that could be used to combat the efforts of “roving criminals.” There was evidence in this case that petitioner and Theaker shipped the albums to the East Coast in order to escape detection by law enforcement authorities in California (see page 6, *supra*)—precisely the sort of activity Congress intended to reach when it enacted Section 2314. A contrary reading of the statute would frustrate legislative intent by immunizing from Section 2314 coverage numerous illicit interstate shipments that cause extensive damage to legitimate commercial enterprises in the entertainment industry. Individuals who traffic in millions of dollars worth of pirated or bootleg recordings could ship such materials over state lines without fear of incurring Section 2314 penalties. As in the case of the National Motor Vehicle Theft Act, Congress was aware that “[p]rofessional thieves resort to innumerable forms of theft” and “presumably sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion.” *United States v. Turley*, 352 U.S. at 416-417 (footnote omitted).

It is most unlikely that Congress would have intended to leave a loophole for interstate shipments of pirated and bootleg records, particularly in view of the major role played by organized crime in this area. A 1980 report by the Attorney General concluded that “[t]here is evidence that organized crime is becoming increasingly involved as a major supplier of counterfeit [films and recordings].” *National Priorities for the Investigation and Prosecution of White Collar Crime: Report of the Attorney General* 28 (1980). And in its 1981 report accompanying amendments to the federal copyright statute, the Senate Judiciary Committee noted that “[t]he tremendous profits to be made, plus the need for sophisticated technology and large amounts of capital, make counterfeiting [of films and recordings] a logical activity for organized crime.” S. Rep. 97-274, 97th Cong., 1st Sess. 5 (1981). The com-

mittee described testimony it had heard concerning the increasing role of organized crime in record and tape piracy:

In the last three years, the mafia has become one of the biggest producers of records and tapes in this country, turning out millions of copies of the hits on the Top 20 list.

The mob's first big hit was the music from the soundtrack of the movie, "Saturday Night Fever" featuring the Bee Gees. RSO records, the company that made the original legal recording, says it sold 23 million copies of the soundtrack from "Saturday Night Fever." Federal investigators say mob counterfeiters made and sold at least that many.

Id. at 5-6 (footnote omitted).

As we discussed above, a major impetus for the 1934 passage of the legislation that is now Section 2314 was Congress's perception of a compelling need for weapons to combat the interstate activities of organized crime (then more colloquially referred to as "gangsters"). Today organized crime has expanded the scope of its activities to include manufacture, interstate shipment, and sale of massive numbers of unauthorized copies of sound recordings and motion pictures. Interpretation of Section 2314 to encompass the interstate transportation aspect of what has become one of organized crime's major commercial enterprises clearly would further the original congressional intent.³⁷

3. Petitioner, like the Fifth Circuit in *Smith* (686 F.2d at 246-249), relies heavily on recent amendments to

³⁷ The Fifth Circuit in *Smith* found it significant that the 1934 legislative history included no reference to copyright or misappropriation by means of unauthorized copying. 686 F.2d at 246. Congress's silence is hardly surprising in view of the fact that the technology necessary to accomplish this type of theft on a commercial scale had not been developed at that time. See pages 3-4 note 4, *supra*. Cf. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 (1968) (in considering application of 1909 copyright statute to cable television, the "inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here").

the federal copyright statute to support the claim that Congress did not intend Section 2314 to reach individuals who engage in copyright infringing activities. Pet. Br. 33-37. He cites Congress's decision not to enact felony penalties for copyright infringement as part of the comprehensive revision of the copyright statute in 1976 and its eventual decision in 1982 to impose such penalties for serious piracy and counterfeiting activities.³⁸ In petitioner's view, the latter legislation, the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 *et seq.*, demonstrates that Congress did not believe that the felony penalties of any other statute, including Section 2314, applied to activities involving copyright infringement prior to 1982. In fact, an examination of the legislative history shows that Congress was aware, and expressed approval, of application of Section 2314 in this area.

Petitioner cites nothing in the legislative history of the 1982 amendments that provides any direct support for his contention. Members of Congress and a Department of Justice spokesperson who advocated passage of the

³⁸ Petitioner points to nothing in the legislative history of the 1976 copyright statute that would indicate that Congress believed that interstate shipments like those made by petitioner could not form the basis for a Section 2314 prosecution. The court in *Smith* (686 F.2d at 247; see also Pet. Br. 33-34) found it significant that in 1975 the president of the Motion Picture Association of America testified in favor of felony treatment for copyright infringement involving film piracy and false labeling. See *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. Pt. 2, at 716 (1976) (testimony of Jack Valenti). There is no indication in that testimony (which focused primarily on the separate issue of cable television) that the MPAA believed that felony treatment might not be available under Section 2314; presumably it was simply recommending an additional enforcement tool that would address the piracy problem more directly. Congress may have declined to add felony provisions to the many other changes it made in 1976 simply because at that time it believed that Section 2314 and other penalties applicable to piracy and counterfeiting activities were sufficient to address the problem.

1982 legislation did express the view that an increase in the penalties for copyright infringement was essential to deter large-scale piracy of sound recordings and motion pictures and that existing misdemeanor penalties had done little to stop these particularly lucrative activities. See 128 Cong. Rec. H1951 (daily ed. May 10, 1982) (remarks of Rep. Kastenmeier); *The Piracy and Counterfeiting Amendments Act of 1981: Hearings on S. 691 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 8 (1981) [hereinafter *The Piracy and Counterfeiting Amendments Act of 1981—S. 691*] (statement of Renee L. Szybala, Special Assistant to the Associate General Counsel). But it is hardly surprising that those who were recommending an increase in the penalties for copyright infringement were emphasizing the inadequacy of penalties for that offense, rather than calling attention to the possibility of prosecutions under other statutes. Moreover, felony penalties for copyright infringement may have been regarded as a needed complement to penalties available under other statutes. A statute like Section 2314 addresses only one stage of a piracy operation (i.e., the transportation of large quantities of pirated materials over state lines); and Section 2314 may present certain difficulties of proof that do not exist in a copyright infringement case, e.g., the requirement that goods transported have a value of \$5,000 or more, or the problem of establishing complicity by all of the infringers in the transportation itself. Congress could reasonably have concluded that, despite the existence of other applicable statutes, an increase in penalties for copyright infringement was also needed for fully effective deterrence of illegal conduct at the most significant stages of a piracy or counterfeiting operation.³⁹

³⁹ Cf. the legislative history of 18 U.S.C. 2318, which penalizes, inter alia, interstate transportation of phonorecords bearing counterfeit labels. At the time Section 2318 was initially considered, the Justice Department advised Congress that it was unaware of any federal statute dealing "directly" with the problem of record counterfeiting or "bootlegging." S. Rep. 2154, 87th Cong., 2d Sess. 8 (1962) (letter from Byron R. White, Deputy Attorney General,

The legislative history of the 1982 amendments indicates affirmatively that Congress was aware of the government's use of Section 2314 to prosecute those who made large shipments of pirated materials. The Senate Judiciary Committee noted that a series of FBI raids had led to the indictment of Sam Goody, Inc., for the purchase and sale of over \$1 million in counterfeit recordings. S. Rep. 97-274, 97th Cong., 1st Sess. 3 (1981). The indictment to which the committee referred included several counts charging Sam Goody with violations of Section 2314 in connection with shipment of the recordings.⁴⁰ And during hearings before a Senate subcommittee, a representative of several industry groups presented a statement that referred to prosecutions of individuals who had shipped large quantities of pirated tapes and films, including the prosecutions in *United States v. Smith*, *supra*, and *United States v. Drebin*, 557 F.2d 1316 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978), both of which included Section 2314 counts. *The Piracy and Counterfeiting Amendments Act of 1981—S. 691*, *supra*, at 37 & n.5 (prepared statement of the Motion Picture Association of America, Inc., and the Recording Industry Association of America, Inc.). The industry groups pointed out (*id.* at 56 n.23) the drawbacks of provisions like Section 2314, noting that the scaling of penalties for copyright infringement according to quantity of infringing works was preferable to the "value" approach of other theft provisions, because

to Hon. James O. Eastland, Chairman of the Senate Judiciary Committee). Of course, Section 2314 does not deal "directly" with the record counterfeiting problem; moreover, it is unclear whether in 1962 record counterfeiting normally involved interstate shipments with a value of more than \$5,000, so that the Justice Department would have considered the possibility of prosecution under Section 2314.

⁴⁰ Almost a year before the Senate report was issued, the district court declined to dismiss those Section 2314 counts in response to arguments similar to those advanced by petitioner in this case. See *United States v. Sam Goody, Inc.*, 506 F. Supp. at 385-391.

there were difficulties involved in assigning a value to illegal reproductions.

The industry groups had been even more explicit several years earlier when they submitted joint statements in support of proposed revisions to the federal criminal code that (like the legislation eventually enacted in 1982) would have brought the offense of criminal copyright infringement into Title 18 and classified that offense as a felony. In their statements the industry groups noted that, because of the modest penalties for criminal copyright infringement, indictments of record and tape pirates and counterfeiters had focused, "when possible, on related criminal offenses—such as mail fraud, wire fraud, ITSP (Interstate Transportation of Stolen Property), RICO (Racketeer-Influenced Corrupt Organizations) and even customs violations," rather than on copyright infringement and counterfeiting. *Reform of the Federal Criminal Laws: Hearings on S. 1722 and S. 1723 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. Pt. 14, at 10699 (1979); *Revision of the Federal Criminal Code: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. Pt. 5, at 4130 (1979). The industry groups noted that in past cases there had been difficulties in establishing the value of unauthorized reproductions for purposes of the theft provisions of the criminal code, citing two cases in which individuals engaged in piracy had been charged with violations of Section 2314, *United States v. Atherton*, 561 F.2d 747 (9th Cir. 1977), and *United States v. Wise*, 550 F.2d 1180 (9th Cir.), cert. denied, 434 U.S. 929 (1977). *Reform of the Federal Criminal Laws*, *supra*, at 10700 n.9; *Revision of the Federal Criminal Code*, *supra*, at 4132 n.8.

The legislative history thus shows that Congress was made aware in both 1979 and 1981 that Section 2314 was being used to prosecute individuals who made interstate shipments in connection with large-scale copyright infringing activity. On neither occasion did it express disapproval of such prosecutions. Indeed, in the statute it-

self Congress appears to have expressed affirmative approval of the use of Section 2314 to reach piracy and counterfeiting operations. When Congress finally enacted the 1982 legislation adding felony penalties for certain types of copyright infringement involving piracy and counterfeiting, it provided that the new penalties "shall be in addition to any other provisions of title 17 or any other law." 18 U.S.C. 2319(a) (emphasis added). See also S. Rep. 97-274, *supra*, at 2 (1982 legislation "is intended to supplement existing remedies contained in the copyright law or any other law"). It seems clear that the phrase "or any other law" refers at least to those criminal statutes, such as Section 2314, that previously had been used to prosecute individuals involved in piracy and counterfeiting operations. See *United States v. Gottesman*, 724 F.2d at 1521 ("any other law" language "effectively ratifies the earlier practice of prosecuting willful copyright infringers under 18 U.S.C. § 2314"); *United States v. Belmont*, 715 F.2d at 462.⁴¹

⁴¹ Petitioner contends (Br. 34-35) that this statutory provision was added only to make clear that certain remedies provided by Title 17 would continue to be available. That reading would render the phrase "any other law" meaningless—a result contrary to established principles of statutory construction. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Even if petitioner's bootlegging activities had occurred after 1982, any prosecution for copyright infringement might have involved only misdemeanor violations. Under 18 U.S.C. 2319(b), felony penalties may be imposed only on those who infringe copyrights in sound recordings, motion pictures, or other audiovisual works; the increased penalties do not apply to those who infringe only a copyright in a musical composition. Many of the Presley recordings that constituted the source material for the bootleg albums in this case were fixed before 1972, the year when Congress extended copyright protection to sound recordings. See pages 3-4 note 4, *supra*.

If petitioner's bootlegging operation had continued after 1982, it is possible that the government could have prosecuted him under 18 U.S.C. 2318, which imposes felony penalties for trafficking in counterfeit labels in certain circumstances, including when the mail is used in commission of the offense. The evidence in the record (see, e.g., J.A. A15; Deary Stiptest. 30-47) suggests that petitioner

C. The Fact That Petitioner's Bootlegging Operation Included Copyright Infringing Activities Does Not Immunize Him From Prosecution Under Section 2314 For His Interstate Shipments Of Bootleg Record Albums

Petitioner's central contention in his opening brief is that, since manufacture and ultimate distribution of the bootleg albums involved copyright infringement, he should be subject only to the misdemeanor penalties of the pre-1982 copyright laws, not to felony penalties under any other criminal statute he may have violated in the course of the bootlegging operation. Petitioner has produced no direct evidence that Congress wished copyright infringement penalties to constitute the exclusive law enforcement weapon against record and tape piracy and bootlegging activities; indeed, as we argued in the preceding section, Congress's express preservation of penalties under "any other law" when it amended the copyright statute in 1982 suggests the contrary conclusion.

In any event, petitioner's contention is at odds with common sense. Piracy and bootlegging operations involve a whole series of steps, beginning with acquisition and unauthorized duplication of source material and ending with distribution of the unauthorized copies to retail customers. Different individuals may participate at different stages of an operation. There is no logical reason for Congress to have concluded that the occurrence of copyright infringing acts at some stages (*e.g.*, copying and ultimate distribution) should insulate the participants from prosecution for other crimes they may commit in the course of the enterprise, including interstate shipments of infringing copies embodying stolen or converted property interests prior to ultimate distribution.

The underlying assumption of petitioner's argument is that the criminal copyright provisions and Section 2314 address the same conduct. Even if this were so, the

arranged for the production of album covers and labels that appeared to be genuine and that the bootleg albums were sold with these counterfeit labels and covers.

government could proceed under both statutes. See *Ball v. United States*, No. 84-5004 (Mar. 26, 1985), slip op. 4-5 & n.7; *United States v. Batchelder*, 442 U.S. 114, 123-124 (1979). In fact, the two provisions are aimed at very different conduct. The copyright statutes penalize reproduction or distribution of copyrighted material without the consent of the copyright proprietor (or, in the case of compulsory licensing, without notifying and paying royalties to the copyright proprietor). There is no requirement of transportation in interstate commerce. Nor is there any minimum volume of infringing activity that must occur in order for penalties to attach.⁴² Section 2314, on the other hand, specifically requires transportation in interstate commerce; and the "goods, wares, [or] merchandise" transported must have a value of at least \$5,000. Section 2314 may be violated without any act of copyright infringement. The fact that petitioner was prosecuted under both statutes simply reflects a commonplace of modern federal criminal law—a particular transaction or operation may entail violations of two different statutes because it satisfies distinct elements of each offense. See *Albernaz v. United States*, 450 U.S. 333, 337-342 (1981); *Gore v. United States*, 357 U.S. 386, 388-391 (1958); *Blockburger v. United States*, 284 U.S. 299 (1932).

In some situations, property that is transported across state lines may infringe a copyright because, *e.g.*, sounds were copied and compositions used without the consent of a copyright proprietor. As we have argued above (pages 26-34), such property is "stolen" or "converted" for the purposes of Section 2314 because its manufacture involves a misappropriation in violation of the rights of others, including the copyright proprietor. But in such a case the conduct penalized by Section 2314 is not the act of copyright infringement (*i.e.*, the unauthorized copying); rather, it is the entirely separate act of transporting

⁴² The availability of the felony penalties enacted in 1982 depends on the reproduction or distribution of certain minimum numbers of infringing copies. See 18 U.S.C. 2319 (b).

stolen property worth \$5,000 or more in interstate commerce. In any Section 2314 case, there will have been some earlier crime involving, *e.g.*, larceny or fraud, that may or may not have been committed by the Section 2314 defendant. It has never been suggested that prosecutors are confined to charging the earlier crime. Indeed, Congress's creation of the Section 2314 offense would have been meaningless if the possibility of prosecution for the earlier crime were to negate the application of Section 2314.⁴³

This case illustrates the differences between copyright infringement and conduct that violates Section 2314. Petitioner was charged with nine counts of infringing copyrights "by distributing to the public by sale phonorecords containing performances of * * * musical compositions or copies of the soundtracks of * * * audiovisual works, without the consent of the copyright proprietors" (J.A. A8). The copyright counts were based on two mailings of bootleg albums to customers located in California; each of these transactions involved less than \$200 worth of albums. See *Lefebvre Stiptest*, 68; *Preston Stiptest*, 85. The Section 2314 counts related to a different stage of the bootlegging operation—petitioner's truck shipments (each with a total worth of considerably more than \$5,000) of bootleg albums from the West Coast to the East Coast, prior to storage on the East Coast and ultimate distribution to customers.⁴⁴ As we have shown in

⁴³ In many instances the original theft will have violated only state law, but it seems clear that Section 2314 applies fully even if, *e.g.*, that theft occurred in a federal enclave or involved federal property, so that it would be subject to federal prosecution apart from the interstate transportation. See *United States v. Kalsbeck*, 625 F.2d 123 (6th Cir.), cert. denied, 449 U.S. 904 (1980); *United States v. Stearns*, 550 F.2d 1167, 1172 (9th Cir. 1977); *United States v. Marzano*, 537 F.2d 257, 273 (7th Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

⁴⁴ In some cases, interstate transportation of large quantities of copyright infringing materials might constitute a violation of both Section 2314 and the copyright laws. This would occur when the

the preceding sections, the language and legislative history of both Section 2314 and the copyright statute support the conclusion that Congress intended Section 2314 to apply to such interstate shipments.⁴⁵

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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shipment constituted distribution of the copies "to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. 106(3). Here petitioner in effect shipped the bootleg albums to himself or one of his co-conspirators; thus, the shipments presumably did not involve distribution within the meaning of the copyright laws.

⁴⁵ Petitioner's suggestion (Br. 38-39) that, even if Section 2314 could be interpreted to cover his conduct, that reading of the statute would violate his right to fair warning that his actions were of a criminal nature is frivolous. Petitioner clearly was aware that he was not engaged in innocent activity. He played a major role in a bootlegging operation of very substantial magnitude, directing the interstate shipment of hundreds of thousands of dollars worth of bootleg recordings. Petitioner explicitly acknowledged to his business associates that he knew that his activities were illegal and that he was wary about making interstate shipments that exceeded a value of \$5,000. See page 16 & note 14, *supra*.